A PRACTICAL TREATISE

ON

CHARTER-PARTIES

OF AFFREIGHTMENT,

BILLS OF LADING,

AND

STOPPAGE IN TRANSITU;

WITH AN

APPENDIX OF PRECEDENTS.

BY

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LONDON:

PRINTED BY S. BROOKE, 35, PATERNOSTER-ROW;

AND SOLD BY

MESSRS. BUTTERWORTH AND SON, FLEET STREET; CLARKE AND SONS, PORTUGAL STREET; R. PHENEY, INNER TEMPLE LANE; AND S. SWEET, CHANCERY LANE.

1813.

PREFACE.

IT may be imagined, that any new publication on the subject of the following pages is unnecessary, after Mr. Abbott's excellent work; but it will be found, upon a mere perusal of the table of contents of that work, that but a small portion of one of the four parts of which it is composed is devoted to the subjects of the present treatise; and the contract of affreightment by charter-party occupies forty pages only of Mr. Abbott's volume.

This therefore may, it is presumed, be considered the first attempt that has been made, separately, to methodize and digest the numerous cases that have been decided upon contracts by charter-party and bills of lading; which alone were originally intended by the author to be the subjects of his investigation. His reasons for considering the doctrine of stoppage *in transitu* will be found in the beginning of the last

part

part of the work. The principal topics discussed by Mr. Abbott, namely, the *property* in merchant ships, and the *persons* employed in the navigation of them, are scarcely touched upon in the following treatise: nor has the author, except in one or two instances, referred to foreign ordinances, or the texts of foreign writers; being of the same opinion with Mr. Serjeant Marshall, that the cases decided in the courts at Westminster afford the best materials for a treatise on contracts, to be construed and enforced by the rules of the common law of England; as at once supplying the rules of law, and shewing the application of them *. The statement of the cases, in many instances, runs to a much greater length than was intended; but it will on no occasion be found to bear any proportion to the length of the reports.

Malynes, Beawes and Molloy, have been consulted; the admiralty cases upon freight are collected and digested; and the laws of Oleron and Wisby are referred to so far as they relate to the contracts in question, but it appears that they materially differ from the rules adopted by the common law courts in the construction of these contracts. The table of contents will shew the general arrangement. Considerable pains have been bestowed in the endeavour to render the subject as clear as possible to the unprofessional reader,

* Preface to the Law of Insurance.

reader, and at the same time to detail the decided cases with accuracy, in the hope that the work may be found equally serviceable to the merchant and the lawyer.

It may not be improper here to observe, that the doctrine of the *nisi prius* decision, which is mentioned with some doubt in page 229, has been just discussed in the following case.

Schack and another against *Anthony*. Trin. 53 Geo. III. K. B.

The first count of the declaration was special, stating the plaintiffs to have been owners of the ship *Susanna*; and that one *Janssen*, as their agent and on their account, had caused to be made a charter-party of affreightment, purporting to be made between Janssen as master, and the defendant, and which was sealed by the master. *Profert* was made of the charter-party; which was set out, whereby it appeared, that the goods were to be delivered to the agents or correspondents of the freighter, according to the bills of lading; and upon such delivery, the defendant covenanted with the master, to pay him or his representative the freight. The count then stated, that the master loaded a cargo, performed the voyage, and delivered the goods to the defendant's agent, according to the

the bills of lading. And in consideration of the premises, and of such delivery of the said goods as aforesaid, the defendant undertook to pay the plaintiffs the freight due for the same, on request; concluding with an averment of the amount. The second count was in *indebitatus assumpsit*, for the freight of goods, carried on board the vessel of the plaintiffs, at the defendant's request.

The charter-party was by indenture, between the master of the one part and the defendant of the other part. All the covenants were by and with the master, generally, and not as agent or on account of the owners, who were not even alluded to in the charter-party. The covenant for the payment of freight was such as stated in the special count of the declaration. The charter-party contained the usual penal clause, binding the *parties* to each other in a certain sum for the performance of the covenants; and concluded, "In witness whereof, the said *parties* hereunto have set their hands and seals, &c.

"*C. Jansen*, (*l. s.*)
"*I. Anthony*, (*l. s.*)"

The plaintiffs were owners of the ship, and the defendant was a partner in the house of Muller and Co., the consignees of the goods by the bills of lading. A verdict was obtained by the plaintiffs; but in Easter

Term

Term last, a rule *nisi* was granted for setting aside the verdict, and entering a nonsuit, on the ground that the plaintiffs could not maintain assumpsit as owners of the vessel, for the freight contracted for under seal by their captain. When the rule came on to be argued, the court desired to hear,

Taddy, in support of the verdict, who argued, that there could be no merger of the parol contract, implied by law in favour of the plaintiffs in respect of their ownership of the vessel, by the charter-party under seal executed by the master, and to which the owners were not parties; that the master could not bind his owners by deed without an authority under seal for that purpose; and that the contract implied to the owners, was by all the persons composing the firm of Muller and Co., though the defendant had not pleaded that fact in abatement, as he might, but the charter-party was executed by the defendant alone. And he cited Anon. 1 Leon. 293. Harrison *v.* Rushworth, 7 T. R. 207. Foster *v.* Allanson, 2 T. R. 479. White *v.* Parkin, 12 East 578, and Rice *v.* Shute, 2 Blac. 695.

But *the court* (without hearing the other side) intimated a decided opinion, that an action of assumpsit was not maintainable by the plaintiffs as owners of the ship,

ship, as the freight was contracted for under seal, by the defendant with the captain of the ship. Lord *Ellenborough* said, suppose a bond be given to a trustee, can an action of assumpsit be maintained by the *cestuy que trust*, for the money secured by the bond? Here, the contract under seal was executed by the defendant, and the interest of the plaintiffs is the same as was secured by the deed. *Le Blanc* and *Bayley*, Justices, assented. And *Bayley*, J. added, that the case of *Rice* and *Shute* only decided, that if the defendant do not plead in abatement, that the contract was made by him and others, *he cannot* afterwards avail himself of that fact.

Rule absolute to enter a nonsuit.

The attorney-general, Sir *W. Garrow*, was with *Taddy*; and *Scarlett* and *Copley* were to have argued on the other side.

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ON CHARTER-PARTIES OF AFFREIGHTMENT.

CHAPTER I.

ON THE NATURE AND FORM OF THE CONTRACT; AND THE PARTIES THERETO; THE SHIP, AND IT'S VOYAGE.

Difference between a general, and a chartered ship.

WHERE different goods of various merchants, unconnected with each other, are loaded on board ship, to be carried on freight, but no particular contract of affreightment is entered into, the ship on board which the goods are loaded is called a *general* ship; because it is open and common to all such merchants as choose to load their goods on board. But where one or more merchants contract in writing for loading their goods, exclusively, on board the whole or part of the ship, it is said to be a *chartered* ship; the contract for this purpose being called a charter-party, which, in such case, specifies the amount of freight, and the other particulars of the contract.

 A charter-

Charter-party, what, and how made.

A charter-party of affreightment, therefore, is a contract in writing, for the letting to freight of the whole or part of a ship, for one or more voyage or voyages. Malyne observes, that no ship should be freighted without a charter-party[a]. It may be under hand and seal, or under hand only; and is as commonly one way, as the other. If under hand and seal, it is considered more conclusively and effectually binding on the parties: more conclusively, because the sufficiency of the consideration, or motive for any of its provisions, cannot be questioned; and more effectually, because in case of death and a deficiency of assets, a specialty creditor is entitled to a priority. It is most usual and convenient to make two copies of the instrument, and to have both of them executed by all the parties, that each may have possession of an original and complete copy of the contract, to inform nimself of the duties he has thereby bound himself to discharge; and that in the event of litigation, either may have his copy to produce in evidence; or, if that be lost, parol proof may be given of the contents, without proving the loss or destruction, in case of the non-production of the copy of the other party, upon notice.

By whom made; and the contents.

A charter-party of affreightment contains not only the covenants or agreements of the person or persons letting, but also of those hiring the ship to freight. The former may be either the captain or master, or the owners of the ship, or both; the latter are the owners of the goods, usually called the freighters, or merchants: any other person or persons may execute the contract as their agents, if properly authorized as such; or

[a] Mal. 97.

or as sureties for them, or otherwise. And where there are several ship-owners or merchants in partnership, it frequently happens that only some of them execute the instrument, either as the sole parties to the contract, or on behalf of themselves and the others. Sometimes, it is executed only by the different part-owners of the ship, where one of them lets (as he may) his share of the vessel to the other. The instrument generally specifies the parties between whom it is made; their character, as master or owner of the ship, the name, burthen, or tonnage by register measurement of the vessel[b], and it's situation at the time it is chartered. That part of the contract which is obligatory on the master or ship-owners, contains, as it were, a lease of the ship, or such part of it as is hired by the merchant; a description of the voyage or voyages; a stipulation as to the sea-worthiness of the ship, and that she shall sail and proceed to load, and deliver the goods; together with an exception of the perils and dangers for which the master and ship-owners do not mean to make themselves responsible. On the part of the freighter, he contracts to load and unload the goods. The times stipulated for that purpose, usually called lay or running days, and days of demurrage, are contained in this part of the contract; as well as the times appointed for payment of the freight; the rate and manner of payment; and the rate of demurrage, in case of the ship's detention beyond her lay or running days. Charter-parties of affreightment generally conclude with a penal clause, binding the master or owners, and the ship, tackle and furniture (and sometimes the freight

[b] Abbott, part 3, c. 1. p. 188. 4th edit.

freight also;) and the freighter or merchant, and his goods, in a certain sum, to the performance of the several stipulations in the charter-party. In order to have a full and clear comprehension of the several particulars relating to contracts of this nature, it will be proper to consider each of them separately, in the order suggested by the form of the contract itself; which seems the best that can be adopted, as being the simplest, most comprehensive, and most convenient for research. In pursuit of this plan we shall, in the present chapter, consider, first, the stamp duty payable on instruments of this nature, the general form of them, and the date or time of their execution; secondly, the parties to the contract; and thirdly, the vessel which is the subject of it, and the voyage or voyages to be performed thereby, under its provisions.

Difference between a memorandum for charter, and a charter-party.

Where the terms of the contract are not so particularly and fully expressed as is usual, the instrument is more frequently and properly called a memorandum or agreement for charter, than a charter-party. The former, in relation to the latter, is in some respects the same as an agreement for a lease of lands, &c. with reference to the lease itself. But a memorandum of this sort is, in many cases, all that is entered into between the parties; and is, as far as it goes, completely binding upon them, unless a more perfect contract be afterwards substituted for it.

Stamp duty.

The stamp duty imposed by the statute 48 *Geo.* 3. c. 149[c]. on a charter-party, is £1. 10*s*.; and where the

[c] See the Schedule, part 1, page 600.

the same, together with any schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, then, for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of £1. The same duty is also imposed by that statute upon any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing, between the captain, master, or owner, and any other person, for or relating to the freight, or conveyance of any money, goods, or effects, on board thereof. Therefore it is not material, whether the instrument purports to be a charter-party, or a memorandum or agreement for charter. It is perhaps much to be lamented, that the distinction should ever have been made between a lease and an agreement for a lease of lands, and that there should be any difference in the amount of the duty payable on those instruments; which has given rise to so much litigation, and uncertainty in the tenure of leasehold property [d].

In the formation of this, as of most other contracts, no particular set of words or expressions is necessary. Hence, although it is usual, it is nevertheless unnecessary, to describe the instrument as a charter-party of affreightment, or memorandum for charter, or the like, in the beginning of it. If the object or intent of the contract appear from the provisions it contains, that is sufficient; and if it be not apparent from them, no description of the instrument can supply the defect, though many things may be implied from the necessary

No precise form necessary.

[d] See 1 T. R. 735. 2 T. R. 739. 5 T. R. 163. 6 East 530. 12 East 168. 3 Taun. 65.

sary operation and effect of that which is expressed in the instrument.

Different forms of charter-parties.

The great variety of circumstances which different voyages occasion, naturally produce a correspondent variety in charter-parties[e]. Different public boards and companies have their own peculiar forms, as, the Navy Board, the Transport Board, the East India Company, &c. Merchants also have different forms of charter-parties, according to the nature of the different trades in which their ships are engaged. To go through the various stipulations which different cases and circumstances may produce would be an endless and unprofitable task: it has been thought sufficient to add, by way of appendix to the volume, some of the most usual and simple forms, from which others may be drawn, with the like or such other stipulations as the nature of the case may require, and the occasion will suggest. It has been already observed[f], that no particular form is necessary; the only rule is, that the contract should be drawn with as much conciseness and perspicuity as possible.

Need not be indented, or so expressed.

Lord Coke says, if a deed is expressed to be indented, which is not so in fact, it is no indenture[g]. But a charter-party need not be indented, or expressed to be so, though it be under seal. The indenting of a deed only becomes material when it is expressly required by statute, as it is in some instances, but not in the case of contracts of affreightment. Where it is expressly required, the good sense of modern judges has, in some cases

[e] Beawes, 141, 5th ed. [f] *Ante*, p. 5. [g] 2 Inst. 672.

cases, dispensed with the formality of the indenting being actually observed, by considering the smallest unevenness on the edge of the instrument sufficient to constitute an indenting; and in other cases, new statutes have been made to render unnecessary that which was once so unreasonably required. Whether a charter-party be expressed to be indented, and whether it in fact be so or not, is wholly immaterial, without regard to the mode in which the instrument is executed, viz. whether it be under seal or not, which alone can govern its legal operation; and perhaps even if it were described in pleading, however unnecessarily, as a charter-party indented, and it were not expressed to be so on the face of the instrument, or to have any obvious marks of indentation, and even though it were in fact not entered into by deed at all, yet, supposing the proper form of remedy to be adopted applicable to a simple contract, the incorrect and superfluous statement might be rejected as surplusage, not requiring proof. From what has been already said however, it appears to be unnecessary in pleading to describe a charter-party, or the like, as *indented*, whether the instrument be or be not so expressed on the face of it. It is quite sufficient to say, that it is *made*[h], or *concluded*[i], which includes every thing necessary to its legal execution.

Date unnecessary; it refers to delivery. Impossible date as none; and it may be contradicted by averment.

A deed dated in figures, without the words "*anno domini*," or "*anno regni*," is clearly good and sufficient[j]. In fact, a charter-party, or other deed or written instrument, does not require any date to be expressed

[h] 7 T. R. 596, 7. [i] 4 East 481. *Et vide infrà.* [j] Holman *v.* Brough, 2 Salk. 658.

pressed on the face of it; for the date is the time of its execution. Whether any date be or be not expressed is immaterial[k]; and an impossible date is as none[l]. Nor is a party in general estopped from saying that a charter-party was indented, made, and concluded on a different day from that on which it bears date: there is nothing inconsistent with the deed in such an allegation; it is quite unimportant when it was indented, and equally so when it was written or made. The only material time is when it was concluded, and a deed can only be said to be concluded when it is delivered: the time of delivery is therefore the important time, for then it takes its effect as a deed; and it is clear that the delivery may, if necessary, be averred to be after the date[m]. If it be impossible to give the charter-party effect, by regarding the day it bears date as that of its execution, the party may aver that the instrument was indented, made, and concluded at a subsequent day; as, where it was dated on the 6th of February, but not in fact executed till the 15th of March, and contained a covenant by the owner, that the ship should proceed from D. where she then lay, on or before the 12th of February on her outward-bound voyage[n].

Where departure from date alledged, not allowed. The word "then" is referable not to date, but delivery.

But if the plaintiff declare upon a deed as dated on a particular day, it shall always be intended that it was delivered at that time, and no other; and if, in pleading, he afterwards state or confess it to have been delivered at any other time, it is a departure from the declaration.

[k] Armitt v. Breame, 1 Salk. 76. [l] Cromwell v. Grunsden, 2 Salk. 463. [m] Stone v. Ball, 3 Lev. 348. [n] Hall v. Cazenove, 4 East 477. 481.

tion. If the covenant for the payment of freight speak of the goods "then" laden, or afterwards to be laden on board the ship, the word "then" is referable to the time when the deed takes effect by delivery, and not to the date; for if it were delivered ten months after the date, the party would not have any benefit of the goods laden before the delivery, therefore he shall not be charged with goods laden before that time. Where the plaintiff declared upon an agreement in a charter-party, dated the 9th of October, to pay for the corn which *then* was, or afterwards should be laden on board the ship; and alledged, that upon the said 9th of October, the ship was laden with sixty lasts of corn, for which the defendant had not paid; the defendant pleaded that the deed was sealed and delivered the 28th of October, and that there was not any corn then or afterwards laden on board, with a traverse of the delivery on the 9th of October, or at any time afterwards, before the 28th; and on demurrer this plea was held good[o].

Where the instrument is *inter partes*, the parties alone can sue, or release.

There is a distinction between an indenture, or deed, which is expressed to be made between certain parties on the one side and others on the other side, and a deed which is not so expressed, but begins, "To all to whom these presents shall come," which is, in fact, the peculiar form of a deed-poll. In the former case, no grant, covenant, or obligation, can be made, or created to, or with any other person than such as may be party to the deed; but in the latter a grant, covenant, or obligation, may be made to or with any person

[o] Osley v. Hicks, Cro. Jac. 263.

person or persons whomsoever, though not parties to the deed. And in the former case, if a person, not enumerated as one of the parties, should be one of the covenantees or obligees, and sign, seal and deliver the deed, yet he is not competent to give a release, nor will his release bar the action of any one who is a party. Therefore, in an action brought by one Scudamore and others against Vandenstene, upon a charter-party by indenture, expressed to be made between the plaintiff and others, owners of a certain ship, whereof one Robert Pitman was master, on the one part, and the defendant on the other part, whereby the plaintiff covenanted with the defendant and Pitman, and the defendant covenanted with the plaintiff and Pitman, binding himself to them in a penalty for the performance of the covenants, and concluding, "In witness whereof the parties to these presents have put their seals, &c." Pitman having executed the indenture, the defendant pleaded in bar a release by him, but on demurrer the above distinction was taken and agreed upon; and it was adjudged that this release of Pitman did not bar the plaintiff, because Pitman was no party to the indenture[p].

A party may sue, though he do not execute.

But if an indenture is expressed to be made between certain parties, and a person, enumerated as one of those parties, is therein named as one of the covenantees and covenantors, though he do not execute the deed, he may yet join in an action for the non-performance of the covenants; for the covenantors are estopped to deny that he is a party. Thus, if a charter-party

[p] Scudamore *v.* Vandenstene, 2 Inst. 673. 2 Rol. Abr. 22. F. 1. S. P.

ter-party by indenture is expressed to be made between A and B, owners of the ship, on the one part and C and D, merchants, on the other part; and B does not seal the indenture, but is throughout mentioned as one of the covenanting parties, with whom, and by whom, the covenants are made together with A; B in this case may join with him in an action of covenant upon the indenture. This appears to have been adjudged on demurrer, as being too clear for argument[q].

A stranger may sue on deed, if not inter partes.

So, where an action was brought on a charter-party of affreightment, not expressed to be between certain parties, but only executed by the defendant and one Bently, the master, and part-owner of the ship, whereby he, with the consent of the plaintiff, the other part-owner, let the ship to the defendant for a voyage; and the defendant covenanted with Bently to pay him so much as master, and then covenanted with him, as well as Cooker, the plaintiff, to pay the latter so much as part-owner, for which last sum the action was brought; on oyer, the deed appeared as above, whereupon the defendant pleaded, that only he and Bently were parties; but it was argued, and resolved, that the deed not being an indenture between certain parties, but only in the nature of a deed-poll, in which a covenant may be made with a stranger, the plaintiff might well maintain his action[r]. It seems that the same rule of construction, with respect to the form of the instrument, and the parties

[q] Clement *v.* Henley, 2 Rol. Abr. 22. F. 2. [r] Cooker *v.* Childs, 2 Lev. 74. Gilby *v.* Copley, 3 Lev. 138. S. P.

parties, by whom it is entered into, or executed, would prevail, whether it be under seal or not[s]; the rules of construction, applicable to specialties and simple contracts, being generally the same; as they depend alone upon the frame and wording of the instrument.

Description of the parties.

Although usual, it does not appear necessary, to mention the character of the parties to the contract; as, whether they be master or owner of the ship, &c. though, where the fact is certain, and the instrument is in the form of an indenture *inter partes*, there can be no objection to so doing. The mention of the character of the parties may have this effect in an instrument so entered into, though not in an instrument in the shape of a deed-poll, or by writing without seal only; namely, that in the first of the above cases, in an action upon the charter-party, it will preclude any proof, which might otherwise be necessary of the fact stated[t], and operate as an estoppel to the defendant to controvert that fact, whatever may be the effect of the circumstance in any other action or proceeding. It is also a convenient form, to name the character of the parties in the beginning of the instrument, in whatever way it may be framed, in order to avoid the unnecessary repetition of names in the subsequent part. And this is therefore universally the form adopted amongst merchants. In the absence of it, the proof of the ownership of the vessel, if it come into question, may be rendered difficult by the register acts.

When

[s] See 7 T. R. 383. *Per* Lord Kenyon. See also 4 T. R. 329, &c.
[t] See 4 East 130. 5 Esp. Rep. 88.

When a ship is chartered at the port to which she belongs, and at which therefore, probably, her owners reside, it is advisable for the freighter, to have the instrument executed by them, as well as the captain or master, if he should not be a part-owner, which he generally is; though this is not always required: for, as it will be hereafter seen, he may be liable to both of them for the freight, and it is but reasonable that they should both be liable to him, for the performance of the contract on their part. Where a ship is chartered at a distant port, there, of necessity, the captain or master, or some agent of the owner or owners, must execute it on their part. If the charter-party be under seal, then all the owners, or freighters, individually, should execute, or, a power of attorney must be procured from such as do not, to authorize some or one of those who do, to execute for them[u]; but, if the contract be in writing, not under seal, this precaution is not necessary, provided one of the part-owners be not expressly restricted from binding the rest, by entering into such contracts. So, if a charter-party, under seal, be executed by some third person as agent, he must be authorized by a power of attorney, to execute it on behalf of his principal; though, if the instrument be not under seal, a mere written or verbal authority is sufficient.

Who should execute, and what authority necessary.

Beawes says, that the parties are either the owners of ships on the one part, and merchants on the other, or masters of ships, invested by the owners with power

Of the master's power to bind the owners by his charter-party.

[u] Harrison v. Jackson, 7 T. R. 207.

power to enter into the contract, and the merchants[v]. But it must not, from this, be inferred that no charter-party by the master will be good, unless he have a special power from the owners to enter into it. For such contracts may be, and most usually are, entered into under seal, as well as under hand only, by the master, in his own name, with the merchants; in which case the master is clearly bound, whether he have any power from the owners, to enter into the engagement, or not. But, in order to bind the owner by the master's charter-party, so as to subject the former to an action at common law for breach of the covenants, it is necessary, if the instrument be under seal, that the master should have a power of attorney or authority by deed[w]; and that he should likewise execute as attorney, for or in the name of the owners; though it seems, that the master is fully competent, without any special authority for the purpose, to bind the owners and the ship by his agreement under hand for the affreightment of the vessel; and that they may be sued as owners, for a breach of their general duty, if not named in the contract, whether it be under seal or not.

Factor's liability, by his execution.

It is also observed by Beawes, that if a factor freight a ship, by order and for account of another, out and home, and a charter-party be accordingly entered into by indenture, between him and the master, the factor is liable for the freight and performance of all the covenants; but if the ship be only freighted outwards, and loaded by the factor, the

[v] Beawes, 133. *Et vide ante* 2, 3. [w] 7 T. R. 207.

the goods shipped are liable for the freight, and no demands are to be made on the freighters in virtue of the charter-party; in this case, the person who receives the goods is to pay freight, according to the tenor of the bill of lading[x]. But although it may be the usage amongst merchants, to look only to the factor for the freight on the charter-party in the former case, and to the consignee of the goods on the bill of lading in the latter, there can now be no doubt, but that any person, under any circumstances, binding himself by deed or parol contract to pay the freight, will be liable to answer for the performance of his engagement, if the freight be not paid by the consignee of the goods, on delivery, according to the bill of lading[y]. If the factor executes the instrument in his own name, he will certainly be personally responsible for the performance of his covenants; but, if he executes in the name of his principal, under a competent authority to bind him, the principal alone is liable.

Attorney must execute charter-party by deed, in name of principal.

It is a general rule, that in the exercise of an authority, under a power of attorney to do any act, the party authorized, ought to do the act in the name of him who gave the authority; for, as he appoints the person to be his attorney, to act in his place, and represent his person, that is no authority to do the act in his own name, as his own proper act, but in the name, and as the act of his principal[z]. Therefore

[x] Beawes, 139. And see 2 Mol. 331. 2 Atk. 622. Payley's Principal and Agent, 157. 256. [y] 2 Taun. 357, 8. 13 East 565. [z] Combes's case, 9 Co. 76, b. Frontin v. Small, 2 Ld. Raym. 1418. S. P. 1 Stra. 705. S. C. 6 T. R. 177. S. P.

Therefore one who executes a charter-party by deed for another, by virtue of a power of attorney, must execute in the name or as the attorney of his principal, and not in his own name generally, as his own deed.

If in principal's name, no particular form necessary.

But provided an attorney executes his power in the name of his principal, and not in his own name, there is no particular form of words required to be used: it cannot make any difference, in what order the names stand; whether the signature be A. B. (the principal's name) by C. D. his attorney, which must be admitted to be good, or C. D. for A. B. In either case, the execution is in the principal's name, and by his authority. Nor is that necessary to be shewn; for if the attorney execute in the name of his principal, it is enough, without stating that he did so[a].

Execution by partners.

If one partner execute a deed for himself and his companion, in his presence and by his authority, it is sufficient though there be but one seal, and it do not appear that he put the seal twice upon the wax; for no particular mode of delivery is necessary. It is enough that both parties were present, and consented to the execution, which binds them all; nor does it seem to be necessary in such case, that the authority given by the one to the other, to execute for him, should itself have been by deed[b].

Execution by A. for himself and B. without B's authority.

If a charter-party, or other instrument, by deed, be executed by a surety for himself and principal, and signed by

[a] Wilks *v.* Back, 2 East 142. [b] Ball *v.* Dunsterville, 4 T. R. 133.

by him with both their names, without having the principal's authority to sign his name, yet it will be good as the separate deed of the surety, and bind him[c]. The case cited was that of an action on a bond: at the trial it appeared, that previous to the execution of the bond, the defendant brought it to the plaintiffs, filled up by his own name only, as surety; the plaintiffs objected that it was not the joint security of him and his partner Marsh; whereupon the bond was, with the defendant's consent, but in Marsh's absence, altered into a joint and several bond, in the names of the defendant and Marsh; and being signed by the defendant, "Davis and Marsh," and sealed with one seal only, was by the former delivered as his act and deed. Marsh, on being informed of the transaction, disapproved of the defendant's conduct. It was therefore insisted, that there was no single execution of the bond, and that the sealing, &c. were insufficient as a joint execution. But Lord Eldon, C. J. observed, that the alteration of the bond having been with the defendant's consent, he could not take advantage of it; and he having professed to execute the deed for himself and his partner, without any authority from him, he alone was bound. The bond began thus, "Know all men by these presents, that J. T. Davis and G. Marsh, &c." In such case the court would, if it were necessary, hold the entire signature to be the defendant's name, and that he was estopped from shewing that it was T. Davis only[d].

Execution by A. in his own name, covenanting for B.

It is as material for a person acting by a power of attorney

[c] Elliott v. Davis, 2 B. & P. 338. [d] *Id.* 3 East 111.

attorney to attend to the due execution of the instrument for his own sake, as for the sake of his principal; for if he do not execute it in the name of the latter, so as to bind him, he may, by an incautious execution of the instrument, make himself personally liable, contrary to his intention. If the defendant become a party to a deed, and execute it in his own name, whereby he covenants for the act of another, he shall be personally bound by such covenant, though he be described in the deed as covenanting for and on behalf of that other person, and the consideration of the deed appear to be a sum of money paid by that person; for there is nothing unusual, unreasonable or illegal, in one man's covenanting for the act of another. The party to whom the covenant is made may prefer the security of the covenantor to that of his principal, who may have given an indemnity against the consequences of the covenant[e].

The vessel, and its burthen, &c.

I know of no authority in our law, which requires it to be stated in the charter-party who is the master or owner of the ship; or the name of it, if it have a name, or even the burthen, if that be ascertained, (which it is necessarily, by the register, in the case of British ships), or where or in what port the ship is lying at the time the charter-party is entered into, though all these particulars are usually inserted in the contract; and when inserted, may relieve the burthen of proof in case of litigation, and preclude dispute, as much and in the same cases as the insertion of the character of the parties. The French ordinance requires the burthen

[e] Appleton v. Binks, 5 East 148.

then of the ship to be mentioned, and renders the master liable for an error in the statement[f], at the same time that the freighter is protected, as to the payment of freight, from any exaggerated account of the burthen of the ship[g]. It is certainly of use to have the burthen specified when there is any doubt or question about it; and if it be specified, care should be taken that it is truly stated, as the statement may otherwise be prejudicial. But if there be any doubt about the real burthen, the safest way for the freighter is to have an express covenant or warranty respecting it, to which he may have recourse, in case the fact should turn out otherwise than as is represented, on proving the covenant or warranty to have been false. Without such covenant or warranty, he may have not only to prove the falsehood of the representation or statement in the charter-party, but also that it was deceitfully and fraudulently made.

The voyage, or voyages.

A charter-party may be for one or more voyage or voyages. The simplest form of such an instrument is that which merely stipulates for a voyage from one place to another; but it is more usual to charter a ship for an outward and homeward-bound voyage, in which case the whole may be described in the contract, and in the construction of it be considered, as one voyage, or several voyages. There is not any reason against inserting the terms and conditions of any number of voyages or adventures in the same charter-party, so that they all be ascertained and agreed upon at the same time; though any material alteration in, or addition

[f] *Liv.* 3. *tit.* 1. *Charter-parties* art. 3. [g] Molloy, l. 2. c. 4. s. 8, and see Abbot, 188.

dition to the voyage or voyages originally agreed upon, and not made until after the concluding of the original contract, will make a new stamp necessary. What shall be deemed a material alteration of the original voyage, or an addition to it, in contradistinction from the insertion of any matter in pursuance of the original contract, and what shall be deemed a conclusion of that contract; so as to avoid it altogether, or make a new stamp necessary, may be determined by analogy to the cases in the books upon bills of exchange, &c. It has been determined, that where the voyage, left open by the charter-party, is once fixed by the freighter, and bills of lading are accordingly signed by the master, the freighter cannot alter the voyage; at all events without calling in the bills of lading, or offering sufficient indemnity to the captain: and therefore the breach of subsequent orders to proceed a different voyage, is no bar to an action on the charter-party, for the freight of the voyage first fixed upon[h]. The power of the supercargo to alter the time of sailing, or the destination of the ship, will be hereafter considered in treating of the sailing of the ship, and her delivery at her destined port. Beawes observes, that the owners often charter a ship outwards, and leave it to the discretion of the master to procure the best freight he can in the foreign port to which the cargo is consigned[i]. Hence it is not unfrequent to have two or more charter-parties for the same ship, the same voyage, if the adventure outwards and homewards to and from the several ports at which she may touch be considered as one voyage; as will be hereafter seen to be the case, unless for the express language of the charter-party to the contrary.

CHAPTER

[h] Davidson v. Gwynne, 12 East 371. [i] Beawes, 133.

CHAPTER II.

ON THE MASTER AND OWNER'S DUTY TO FIT THE SHIP, AND LOAD THE GOODS.

HAVING in the previous chapter considered the general nature and contents of a charter-party of affreightment, the next consideration is, that part of it which ascertains the duty of the master and owners of the ship to fit the vessel for the voyage, and load the goods on board. Each of these obligations is subject to a four-fold division. The fitting of the ship may be considered, as it relates to, first, the sea-worthiness of the ship; secondly, the ship's furniture; thirdly, her crew; and fourthly, her provisions. The loading of the goods, as it includes first, the proceeding to the ship's loading port; secondly, her remaining her lay days there; thirdly, what goods the master is bound to receive, and what delivery will charge him; and fourthly, the consequences of his negligence or misconduct in taking the goods on board, or overloading the ship. Division of chapter.

The usual provision with respect to the ship's sea-worthiness is, that she is, or shall be made, tight, staunch and strong, and every way furnished, manned, Sea-worthiness.

 victualled

victualled and provided, as is usual for vessels in merchants' service, and necessary for the voyage agreed upon. The first three of the above provisions seem to relate to the hull or body of the ship; the fourth, to its furniture, which includes the rigging, &c.; the fifth, the sufficiency of the crew; the sixth, the sea stock; and the last, any thing else which may be usual or necessary to render her outfit complete for the voyage. Here it may be observed, that the contract by charter-party is, in this respect, different from that which the law raises in the case of a common carrier, that the liability of the captain, or master and owners of the ship is pointed out by the express terms of their own particular and private contract, which silences any contract that the law might otherwise raise against them; but in the case of a common carrier, there being no specific contract between the parties, the obligation and liability must depend upon that raised or supposed to enforce the general rule of law. Besides, the liability of the former commences with the contract, but that of the latter only by what happens subsequent to the contract. In the course of this treatise, it is intended principally to consider the nature and extent of the obligation created by the several stipulations in a charter-party of affreightment, and the various cases determined upon the construction of those stipulations.

Covenant that ship shall forthwith be made tight, &c. not a condition precedent.

If the covenants or agreements in a charter-party for the sea-worthiness of the ship be broken, the freighter's remedy is by action for such breach of contract, which will not afford any defence to an action for the freight. In a recent case, of an action of covenant on a charter-party for freight, the defendant craved oyer of the charter-party,

charter-party, by which it appeared that the plaintiff covenanted that the ship should be forthwith made tight, &c. for a voyage of twelve months, and be so kept; and the defendants pleaded that she was not, forthwith after the making of the charter-party, made tight, &c. whereby she was hindered from proceeding on the voyage, and detained an unreasonable length of time, during which the defendants were deprived of the use of her, and put to great expence in fitting her for the voyage; and also divers goods on board her belonging to them, were damaged: it was held, on demurrer to this plea, that the defendants could not insist that the *forthwith* making the ship tight, &c. was a condition precedent to the recovery of freight; especially as they had not immediately repudiated the ship, but taken her into their service, and employed her for several months[a]. Whether a particular covenant constitutes a condition precedent depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained[b]. Another rule is, that where mutual covenants go to the whole consideration, they are conditions precedent; but where they go only to a part, and a breach may be paid for in damages, for which the defendant has his remedy, he shall not be allowed to plead the plaintiff's covenant as a condition precedent[c]. Had the plaintiff's neglect in the above case, precluded the defendants from making any use of the vessel, it might have gone to the whole consideration, and been insisted upon as an entire bar; but as the defendants had some use of the vessel, it could

[a] Havelock *v.* Geddes, 10 East 555. [b] Porter *v.* Shephard, 6 T. R. 668. Glazebrook *v.* Woodrow, 8 T. R. 370. [c] Boon *v.* Eyre, 1 H. B. 273.

could only be considered as going to a part of the consideration, and therefore merely gave the defendants a remedy for such damages as they sustained by the plaintiff's neglect; for, otherwise, the neglect of putting in a single nail, for a single moment, might prevent the recovery of any freight.

A fortiori that she shall be kept so, is not.

Another plea in the above case stated, that during the twelve months mentioned in the charter-party, goods were shipped on board the vessel, and that she was not then tight, &c. but the contrary; in consequence of which it became necessary to unload the goods and repair her, whereby the ship was unemployed for the greatest part of the time; and that the defendants paid for the use of her during the rest of the time. Another plea averred that the ship was not in their service for ten months in the whole; as the freight claimed was not payable until the end of ten months. It was however perfectly consistent with these pleas, that the ship might have been thoroughly repaired immediately after the execution of the charter-party, and when the defendants took her into their service, but that she became out of repair from an accident while in their employ, and not by the fault of the plaintiff. The court were therefore of opinion that the defendants had no right to deduct any thing out of the freight. In the course of things it might be expected that the ship would want repairs in a twelve months voyage; and when the defendants were making their bargain, they should have stipulated to deduct for the time necessary to make those repairs [d]. It seems advisable for the master

[d] Havelock v. Geddes, 10 East 555.

master or owners of the ship only to contract to keep the ship tight, &c. during the voyage *to the best of their endeavours*, as it may sometimes be wholly out of their power fully to attain that object. Without such stipulation they will be liable to an action on their covenant, if there be not a strict performance of it, though they may not be at all in fault; but such a stipulation will secure them from litigation in that event. By one of the laws of Wisby it is provided, that in case the master be at the charge of repairing the ship, or of buying any thing for the service thereof, he shall be reimbursed, and every part-owner shall pay his share[e]. And by the common law, if nothing be said in the charter-party or agreement of affreightment respecting the repairs, but there is the usual stipulation that the ship shall be and continue tight, &c. the whole expence must be ultimately borne by the owners of the vessel. It is indeed sufficiently hard upon the freighter, that if repairs be wanting, and part of the time for which the ship is freighted be spent in making them, he is to have no compensation or allowance on that account, without making him contribute to the expence of repairing the ship of the owners.

Such covenants exempt the freighter from general average loss on the ship.

The meaning of a general average has been for a long time well understood in the commercial world. If in the hour of danger masts are cut away, or goods thrown overboard, those who are benefited by the preservation of the ship are, in the absence of any express agreement, by a contract implied by operation of law, liable to contribute to the general loss sustained,

[e] Leg. Wis. 65.

tained, in proportion to their respective interests. But where a charter-party is entered into containing particular stipulations respecting the repair of the ship, that supersedes all considerations respecting a general average. And where it is agreed that the ship shall, at the expence of the owners, be kept strong and tight during the whole of the voyage, and it appears by the whole instrument that it was the intention of the parties that the defendant should not bear any expence of keeping the ship in repair, but that every thing necessary to enable the ship to perform her voyage should be provided by her owners; expences incurred as necessary in order to put the ship in a condition to complete the voyage, must be borne by the owners, who undertook to make the repairs, and cannot be thrown upon the merchant, as in a case of general average[f]. In the case cited, it was agreed between the parties, that in the event of any of the goods being thrown overboard for the preservation of the ship or cargo, the defendant should contribute his proportion of a general average in respect of such goods; which, of itself, afforded a strong argument that he was not to be liable to general average in other cases[g].

Of the furniture of the ship. It has been justly observed, that an insufficiency in the furniture of the ship cannot easily be unknown to the master or owners, but in the body there may be latent defects unknown to both. However, defects of this sort cannot exist, unless occasioned by the age or particular

[f] Jackson v. Charnock, 8 T. R. 509. [g] *Id.*

particular employment of the ship, or some accidental disaster that may have happened to it, which ought to be and is probably known to the owner as well as the master, and should lead to an examination of her interior as well as exterior parts. If the ship be not tight, staunch and strong, in all respects, the terms of the charter-party are not complied with; nor can the ignorance of the master excuse him[h]. There is the greater reason for making him liable to the freighter, in the event of the ship's not being sea-worthy, when it is remembered that a want of sea-worthiness vacates any insurance effected on the ship, although the person effecting it were ignorant of the fact[i]. In the case of a general ship it is the duty of the master to provide ropes, &c. proper for the reception of the goods into the ship, and it must also be furnished with proper dunnage, or pieces of wood placed against the sides or bottom of the hold to preserve the cargo from the effects of leakage, according to its nature and quality[j]. These things are frequently contracted for by an express clause in charter-parties; and may perhaps be considered as part of the necessary furniture of a chartered ship, without any express stipulation. It may be observed that the furniture of a ship, (in which may be included its tackle and rigging, &c.) is as material to the security of the cargo, as the tightness of the hull or body of the vessel, for in case the former be wanting, if the cargo be securely shipped, neither can the ship itself, nor the cargo be afterwards safe. With respect to general ships, the laws of Oleron and Wisby have the following provisions

[h] Abbot, 231, &c. [i] Marshal, 61. c. 11. s. 1. [j] Abbot, 235.

provisions as to the necessity of furnishing the vessel with good cordage, &c. that when the master freights a ship he ought to shew his merchants the cordage that belongs to her, and if they see any thing amiss or wanting he must rectify it; and if for want of good cordage any pipe, hogshead, &c. should be spoiled or lost, the master and mariners shall make it good to the merchants: likewise if the ropes or slings break, the master not having shewed them to the merchants, he shall make satisfaction for the damage; but if the merchants say that the cordage is good and sufficient, and are satisfied therewith, and afterwards it happens that they break, in that case each of them shall share the damage, viz. the merchants to whom the goods belong, and the master of the ship with his mariners [k]. But however the case may be with a general ship, it is clearly unnecessary for the master of a chartered one to consult the freighter as to the sufficiency of the cordage; each party is bound to look to the performance of his part of the express contract contained in the charter-party: nor can any thing which passes between them verbally discharge either from his obligation, unless it be in the nature of a release from it, and intended as such.

Of the ship's crew.

Not only must the ship and her furniture be sufficient for the voyage, but she must be manned with an adequate number of persons, of competent skill and ability to navigate her. A sufficient number of persons must also be provided to protect the goods after they are loaded. These precautions appear to be equally necessary

[k] Leg. Ol. 10. Leg. Wis. 22. 49.

necessary in the case of a chartered as of a general ship. A deficiency of the crew is, in truth, a defect or want of sea-worthiness; for an inability to navigate is the consequence of it: therefore, where the question was, whether the want of hands to navigate the ship was an inability of the ship to execute or proceed on the voyage, it was held, that the term inabililty might fairly be taken to mean not only an inability in respect of the hull and tackle of the ship, but also the crew[l]. It seems, that if the charter-party were to stipulate generally, that the ship should be every way fitted for the voyage, without any express covenant that she should be properly manned, such general stipulation would be the same in effect, and bind the owner or captain to furnish her with sufficient and proper hands to navigate her. If it be stipulated in the charter-party, that the vessel is to be manned in a certain proportion to the tonnage, and that the whole number of men shall be constantly on board, without any provision for the event of sickness, death, or desertion, &c. the covenantor takes upon himself to keep up that number, at all events, and is therefore bound to provide against the contingencies of disease, &c. as, by taking an extra number of hands on board[m]. If the party would otherwise protect himself, he may do so by a proper exception against his liability in such events. The distinction is, that where the *law* imposes an obligation, and performance is prevented by the act of God, that will excuse the party; but not where the *party* himself makes his own express contract, without any exception.

The

[l] Beatson v. Schank, 3 East 233. [m] *Id.*

Putting to sea without a pilot, &c.

The master must answer for the consequences, if he put to sea without a skilful pilot, or in an unseasonable time, or without sufficient furniture and necessaries. The Emperors Gratian, Theodosius, and Valerian, it is said, decreed that no man should adventure upon the seas between November and April; but the vast improvements in navigation, since those times, have made unnecessary any prohibition of that nature. Yet it is not allowed by our law for any captain or master of a ship to put other persons property in hazard by proceeding to sea in stormy and tempestuous weather[n]. By the Roman law, the master is liable for what may happen if he take a dangerous course, or go in the way of pirates, enemies, or the like. So, if he carry the flag of other nations, and not his own; for it has been well observed, as goods should be marked, that they may be delivered to the owner, so ships should bear their proper flag, that they may be discerned one from another[o]. By the statute 48 *Geo.* 3. c. 104. s. 25. it is provided, that the master or owner of a ship shall not be answerable for any loss or damage, by reason of no pilot being on board, unless it be in consequence of the refusal or negligence of the master in not taking one, who shall be ready and offer to take charge of the ship.

Consequences of there not being sufficient men.

If the master covenants that the ship shall be well furnished with men, and the freighter covenants that it shall return in a given time, in an action on the latter covenant, for not returning in time, it is a good plea that the ship was not sufficiently provided with men,

[n] Mal. 98, 9. [o] *Id.* 99.

men, &c. or that during the voyage the seamen left the ship, and the master did not provide others, and that it was on that account she could not get back; for the non-performance of the plaintiff's covenant, in such case, disables the defendant from performing his covenant[p]. In the case cited, the plea stated that the ship was, at her departure, manned with the master, seven men, and a boy, and that she then sailed on her voyage to Jamaica, where six of the seamen left the ship; and that the master did not provide others in their room, whereby she was detained so long at Jamaica that she could not get back within the appointed time[q]. The covenant that a ship shall be well furnished with men therefore, means not merely that a sufficient number shall be taken on board, but that such number shall be provided and kept on board her during the whole voyage. By the laws of Oleron and Wisby, if the master turn a mariner out of the ship, upon any difference or disagreement between them, notwithstanding an offer to make satisfaction, and take not another mariner into the ship in his stead, as able as the first, and the ship or lading happen to be through any misfortune damnified, the master shall make good the loss or damage, if it happen for want of the assistance of the mariner turned out of the ship[r]. This applies to a general ship; but in case of one chartered with the usual clauses, the master is liable to an action upon his covenant, if he either omit to take a sufficient number of able seamen on board, or improperly cause them to leave the ship before the voyage is

[p] Wynne v. Fellows, 1 Sho. 394. [q] *Id.* [r] Leg. Ol. 13. Leg. Wis. 25.

is finished, or do not provide others in their room, in case of misconduct or desertion.

Provisioning the ship.

It is of equal importance that the ship should be properly victualled, as that it should be sufficiently manned; therefore if there be no sufficient supply of fresh water, or other necessary provisions in proportion to the voyage, the ship is in effect not sea-worthy, or, in other words, not capable of performing the voyage for which she is chartered, and the owner or master is liable to an action for a breach of his contract. The laws of Oleron and Wisby provide, that in voyages wherein wine may be had, the master is obliged to give it to the seamen, and that they shall have but one set meal a day allowed; but where they drink nothing but water, they shall have two meals a day[s]. And it is declared by those laws, that British mariners are entitled to but one meal a day, as they have liquor; but those of Normandy have two, because they have only water at the ship's allowance[t]. However, these rules will not affect a contract by charter-party, which is to be performed according to the usage on similar voyages. Where the language of the charter-party is express and specific, no doubt can arise but that it must be performed accordingly; and where the contract is general or obscure, it will receive a liberal interpretation, agreeably to the usage amongst merchants.

Monthly sum for provisions till ship dispatched from her *last* port, means last consigned port.

If payment for provisions or the like, by the month, be limited by the charter-party to cease at the time when

[s] Leg. Wis. 29. Leg. Ol. 17. [t] Leg. Ol. 17.

when the ship shall be dispatched from her last port, on her return home, that means her last consigned port, in the course of her voyage, as directed by the charter-party. Therefore it has been held that the clause in the East India Company's charter-parties, whereby the Company agree to allow £200 *per* month for provisions while the ship remains in India or China, to be computed from her delivery of the Company's dispatches (if any) at the ship's "first consigned port, until she should be dispatched from her *last port* in India or China on her return to Europe," is to be understood of her last consigned port; and will not include the time which elapsed after her departure from her last consigned port, according to her sailing instructions, on her return to Europe, from which course she was driven by distress of weather, and forced to put into Bombay for repairs, before she was again dispatched for Europe. But after the ship was ready to sail again from Bombay, the Company having detained her two months longer for convoy before they again dispatched her for Europe, they paid £200 a month for that period[a].

I do not find any case wherein any particular rule of construction has been laid down as to those general words in a charter-party, which, after requiring the ship to be tight, &c. express that she is to be in every way fitted, as is usual for vessels in merchants' service, and necessary for the voyage; but it is apprehended, in analogy to other cases, that in order to prove what is *usual* as to fitting vessels in merchants' service, no universal

Construction of the clause, "that the vessel shall be provided as usual, and necessary," &c.

[a] Moffat v. The East India Company, 10 East 469.

universal or precise usage need be shewn in evidence, as to the quantity or quality of the stores furnished to such vessels, or the like; but it would be sufficient to shew what was the prevalent usage amongst merchants in this respect, and that the ship in question was fitted according to it. And as to what outfit may be *necessary* for the voyage, what is usual must be presumed to be necessary; at all events, proof that the ship was fitted as vessels in the merchants' service for such a voyage usually are, would be evidence that it had been provided with all that was necessary for the voyage in question[v].

Proceeding to loading port.

When the ship is not in a situation to receive her outward cargo at the time she is chartered, but is to proceed to some other port or place for that purpose, it is generally specified in the charter-party; and she must proceed to that place accordingly. To enable her to do this, the master must obtain the requisite clearances and licences for the voyage, and pay the necessary port and other charges to enable him to sail, unless it is otherwise provided by the charter-party. This, which is certainly the master's duty in the case of a general ship where there is no charter-party, seems to be implied in the covenant to sail according to the provisions of the charter-party, where there is one; for that must mean a lawful sailing, and obliges the party to do every thing in his power to accomplish it.

Ship must remain her proper lay days.

The ship must remain its lay or running days at her loading port, for the purpose of taking in her cargo; and

[v] See 4 East 154.

and if she be not loaded in that time, the master should make protest accordingly; otherwise it is said, freight cannot be claimed by the common law, or suit in the Admiralty Court. In 1587, this matter was in question with five ships from Leghorn and Civita Vecchia to England, when the grand armada was preparing in Spain. They all of them came away without their lading. Two of the ships had remained the due time stipulated in the charter-party for taking in their lading, and the master had made notarial protests against the factors; these were, by the Admiralty law, adjudged to have earned their whole freight. Two other of these ships not having staid their proper lay days, nor made any protest, were found not to have earned any freight at all, although they were laden outward[w]. The charter-party of the fifth of the above ships contained a proviso, that if in her return from the Straits, she should be taken or cast away, the outward freight should nevertheless be paid, which was therefore adjudged to the master; but no more, he not having remained the appointed time. And (says Malyne) if there had not been this proviso, he could not have recovered any thing[x].

What goods the master is bound to receive.

The next consideration is the duty of the captain and owners with respect to receiving the goods on board from the merchants, their factors or agents; with respect to which it may be observed, that unless the charter-party provides to the contrary, as it may, the merchant is at liberty to ship whatever goods he pleases, whether they be of one sort or another, or of several

w Mal. 98. x Id.

several different sorts, and whether the whole or any part of them belong to the merchant alone, or to him and other persons jointly, or be altogether the property of other persons. And the merchant may, if he pleases, underlet to another or others the whole or any part of the ship chartered to him, at the same or a different rate from that fixed by the original charter-party; contrary to the French ordinance, which prohibits underletting at an advanced price. Consequently it is in general the duty of the captain and owners to receive such goods as are brought to them; though if the charter-party be for the affreightment of particular goods, or the property of particular persons, the captain and owners can only be obliged to load such goods or property. They cannot be compelled in any case to receive unlawful goods, or such as would subject the ship to confiscation; nor can they be obliged to take on board more than the ship can reasonably stow and carry, above her tackle, apparel, furniture and provisions, &c. This is in general agreed by the charter-party, though it is presumed that the law would put such construction upon it, without any express agreement.

What delivery on board will charge him.

When the goods are delivered on board ship by a wharfinger, the responsibility of the master or owners of the ship begins where that of the wharfinger ends; but to charge the master, &c. the delivery must be to an officer or person accredited on board the ship, and not to the crew at random. The mate is such a recognized officer on board the ship, that delivery to him is a good delivery, whereby the responsibility of the ship attaches; nor can the negligence of the mate

revive

revive the responsibility of the wharfinger, after it is once at an end. What delivery is sufficient is, in general, a question of fact, depending on usage, and to be tried by a jury[y].

Consequence of negligence in taking goods on board.

In taking the goods on board, it is the duty of the master to see that the ropes are sufficient, and securely fastened about the goods in hoisting them into the vessel. The laws of Oleron and Wisby provide, that if in hoisting of wines, &c. the men do not fasten the ropes well at the ends of the pipes, &c. so that they slip and fall, and are lost, the master and mariners are bound to make them good to the merchants; but the merchants must pay the freight of the damnified or lost wines, because they are to be paid by the master and mariners what the rest of the wines shall be sold for. The owners of the ship are not, by those laws, to suffer; because the damage happened by default of the master and mariners[z]. But in cases of chartered ships, the master or owners, or any other persons who bind themselves by the charter-party, and such alone, are answerable for the breach of any of their covenants or agreements contained in it, whether it be under seal or not. In general the freighter covenants to bring the goods alongside the vessel, and the master or owners to load and stow them properly on board, which, of course, makes them answerable for any misconduct or negligence in the loading or stowage.

Consequences of overloading the ship.

It is said by Malyne, in his chapter on affreightment by charter-party, that if the master take on board more lading

[y] Cobban v. Downe, 5 Esp. 41. [z] Leg. Ol. 26. Leg. Wis. 23.

lading than the acknowledged burthen of the ship, especially if it consist of other persons' goods than the freighters, he loses his whole freight; for by this he may endanger the merchant's goods which he has contracted to carry: and in such case, if any part of those goods are cast over-board in a storm, the loss shall not be made up by contribution or average of the merchant, but by the master's own purse[a]. Malyne also farther lays it down, that if any man compel the master to overburthen the ship or boat, he may be accused criminally, besides being compelled to pay the damages happening thereby[b]. Nearly to the same effect Beawes observes, that if the master lets out his ship, and afterwards secretly takes in other goods unknown to the first freighter, *by the law marine*, he loses his freight; and if it so happen that any of the freighter's goods, for safety of the ship, be cast overboard, the rest shall not become subject to the average, but the master must make the damage good; though, (according to Beawes) if the goods be brought into the ship secretly and unknown to him, it is otherwise[c]. The observations of both these writers seem to be founded upon one of the laws of Wisby, which provides that the ship being laden, the master must not take in any more goods without the merchant's leave; and if he fails therein, in case there be casting of the goods overboard, he shall be a loser by so much more commodities as he has taken on board over and above what he ought. Therefore upon the lading of the ship, he ought to declare his intention to take such and such goods[d]. But though this seems to be the marine law upon the subject,

[a] Mal. 99. [b] *Id.* [c] Beawes, 137. [d] Leg. Wis. 46.

subject, the rule of the common law, in the absence of any *express* provision in the charter-party on the subject, in analogy to other cases, seems to be this, that if the master overloads the ship by putting on board more than she can reasonably stow and carry, over and above her tackle, &c. by which a damage happens to the freighter, his so doing would be a breach of the *implied* covenant in the charter-party, not to do so, by the words "that he will load and stow all such goods as shall be sent alongside, *not exceeding* what the ship can reasonably stow and carry, &c."

CHAPTER III.

OF THE PERFORMANCE OF THE VOYAGE.

Sailing with convenient speed.

WE now come to consider the stipulation in the charter-party that the ship shall sail on her voyage; with respect to which it may be observed, that the usual form of the contract is, that she shall with all convenient speed, sail and proceed to such a port or so near thereto as she may safely get. Where this form is adopted, it becomes a question of fact for the jury to decide, if any doubt arise respecting it in an action on the charter-party for delaying to sail, whether she did or did not sail in a reasonable or convenient time, which may depend upon many circumstances: as, whether she was agreed to be already sea-worthy and fitted for the voyage at the time of entering into the contract, or was to be afterwards made so; and in the latter case, what was necessary to be done in order to make her sea-worthy, and complete her outfit; and the state of the wind and weather. Any restraint by embargo in port, or enemies at sea, or the like, may or may not make it convenient or reasonable for her to sail.

Some-

Sometimes the charter-party provides that the ship shall be ready and sail by a certain day, in which case there can be no question, but that the owners or captain will be liable to an action if she do not sail by that day; unless where that is rendered impossible by the day having passed before the execution of the contract, or it is prevented by any of the excepted dangers. But where a charter-party, purporting to be indented and made on the 6th of February, 1801, though not in fact executed till the 15th of March, stipulated that the ship should proceed on her voyage from Deptford on or before the 12th of February, and the owner covenanted with the freighter that she should so proceed on or before that day; in consideration whereof the defendant covenanted to load and pay the freight, &c. the plaintiff averred performance on his part of every thing contained in the charter-party which could possibly be performed; and the defendant, by demurrer, objected, that it did not appear that the ship proceeded from Deptford on or before the 12th of February, and that the plaintiff was precluded from alledging that the charter-party was not indented and made on the day which it bore date. But it was held that the party was not estopped or precluded from making that allegation, which amounted to no more than saying, that although the instrument was written on that day, it was not executed till another subsequent day, which is the important time when it takes effect as a deed; and it could not operate as an estoppel to say that which was impossible at the time of its execution[a]. And as to the objection, that the sailing on the 12th of February was a condition

On or before a certain day.

[a] *Ante*, 7, 8.

tion precedent, the performance of which was necessary to entitle the plaintiff to recover, (if it had been possible at the time the charter-party was delivered, the time of performance not having then gone by,) Lord Ellenborough, C. J. declared the inclination of his opinion to be, that it would have been a condition precedent; on which point, however, he did not give any decided opinion. But when the deed was executed and delivered, the stipulation, which was possible at the time the deed was framed, had become impossible, from the day stipulated having passed. The stipulation therefore had then become wholly nugatory, and could not be understood as having formed any part of the contract between the parties, without imputing to them the most manifest absurdity. Then the rest of the contract might take effect, which was prospective at the time the deed was concluded. Grose, J. declared himself of the same opinion. Lawrence, J. doubted whether the sailing on or before the 12th of February was a condition precedent to the plaintiff's recovery, or merely a prospective covenant; but taking it in the former sense, yet it having become by the lapse of time altogether impossible when the deed was executed, it could (he said) form no part of the agreement; and in construing instruments the court must look to the substance, in order to discover the meaning of them: he compared the case to that of Constable and Cloberie[b], and said he took it to be rather a case of mutual covenants than a condition precedent, as the plaintiff's covenant went only to a part of the consideration, and a breach of it might be compensated in damages, to obtain which the defendant had his

[b] Palm. 397.

his remedy on the covenant; according to the principle of Boone and Eyre[c], Le Blanc, J. expressed the same opinion[d]. In a late *Nisi Prius* case before Lord Ellenborough, his Lordship recognized the above principle as applicable to cases of this description[e].

If the plaintiff covenant that the ship shall sail with the first fair wind, and the defendant covenant that if the vessel goes the intended voyage the plaintiff shall have so much for it, the substance of the plaintiff's covenant is that the ship shall go the voyage, and not that she shall sail with the next wind; for that may change every hour. It cannot have been the intention of the parties to hazard the whole obligation of the contract upon that which was so uncertain, and perhaps may be impossible; but their principal object must have been that the ship should sail with convenient speed, with reference to the circumstances before alluded to, no certain time being fixed by the contract. Supposing the covenant to be, that *if* the plaintiff sail with the next wind, that then the defendant will pay the freight, there the circumstance of her so sailing might, by the word *if*, be made a condition precedent to the plaintiff's right to freight, and become a substantial part of the contract; so that in an action on the charter-party for the freight, the plaintiff must aver and prove that he sailed with the first wind, the allegation being traversable[g]; but it is not traversable in the case first above supposed, though alledged[h]. With the first fair wind.

In

[c] 1 H. B. 273. [d] Hall *v.* Cazenove, 4 East 477. [e] Bornman *v.* Tooke, 1 Camp. 377. [f] See 4 East 152, 3, *per* Lawrence, J. [g] *Sed qu?* see Hotham *v.* E. I. C., Doug. 272. [h] Constable *v.* Cloberie, Palm. 397.

In an action for freight upon a charter-party, whereby the master of a ship covenanted to sail with the first fair wind to Barcelona, and return with the first fair wind to London, the defendant pleaded that the ship did not return directly to London, but went to Alicant, Tangiers and other places, whereby the goods were spoiled; but on demurrer judgment was given for the plaintiff, because the covenants were mutual and reciprocal, whereupon each party might have his action against the other, and not conditions precedent, so as to be pleaded in bar; for perhaps the damage sustained by the different parties might be unequal[i].

With the first convoy.

So, the stipulation for sailing with the first convoy only goes to the question of damages; it is not a condition precedent to the recovery of freight. The object of the contract is the performance of the voyage. Nor is it material that the freight is covenanted to be paid *in consideration of every thing beforementioned*, and the sailing with the first convoy is so mentioned in the charter-party[j]. In the case cited, those of Boone and Eyre[k] and Ritchie and Atkinson[l], were recognized: the charter-party stipulated that the ship should join the first convoy that sailed after she should be loaded, from England for Spain and Portugal, or either: the declaration averred that the vessel sailed with the convoy (without saying the first convoy) from England to Lisbon. To this the defendant pleaded, that the master, having taken on board a cargo loaded by the defendant as freighter, was ordered by him immediately to proceed, and join the first

[i] Cole v. Shallett, 3 Lev. 41. [j] Davidson v. Gwynne, 12 East 381.
[k] 1 H. B. 273. [l] 10 East 295. 530.

first convoy that should sail from England for Portugal; and that afterwards such convoy sailed, to wit, from Portsmouth to London; and that although neither wind nor weather prevented, the plaintiff neglected to proceed and join such first convoy. This plea was held bad, upon general demurrer, upon the above reasons and authorities[m].

What is a sailing with convoy.

It may be proper in this place shortly to state the rules of construction with regard to warranties to sail with convoy, in cases of insurance, which will in general point out the true construction of covenants of this nature in charter-parties. A warranty or covenant to sail with convoy does not require that the vessel shall so sail from her lading port, but only from the place of rendezvous appointed for vessels sailing from that port; therefore, if her lading port be London, and the place of rendezvous be the Downs[n], or Spithead[o], it is sufficient if the vessel sail with convoy from thence. On the other hand, it is not necessary that she should sail with convoy bound to her port of discharge, it being sufficient that it is the only convoy appointed for vessels sailing to that port[p]. So if the ship sails under a force appointed to accompany the fleet for a part of the voyage only, and is then to be succeeded by another force[q], or she sails under the protection of a small force detached from the main body, to bring the fleet up to a particular point, this is sufficient[r].

But

[m] 12 East 381. [n] Lethulier's case, 2 Salk. 443. [o] Gordon *v.* Morley, 9 Str. 1265. Victorin *v.* Cleeve, *Id.* 1251. [p] D'Eguino *v.* Bewicke, 2 H. B. 552. [q] Smith *v.* Readshaw, and De Garay *v.* Claget, Park. c. 18. p. 454. [r] Manning *v.* Gist, Marshall, b. ? c. 8. s. 4. Audley *v.* Duff, 2 B. & P. 111, and see Abbot, 238, &c.

What is not. But a covenant to sail with convoy means a convoy appointed either immediately by government, or by the commander on a particular station. The convoy of a ship of war accidentally going the same voyage is not sufficient[s]: and it is necessary that the vessel should continue, during its course, under the same protection[t], unless it be prevented by unavoidable accident; but if such accident happen, and the master does every thing in his power to continue under protection of the convoy, he will be excused[u]; at all events if there be the usual exception in the charter-party. It is also necessary for the master, previous to his departure, to obtain, or do his best endeavours to obtain, the sailing instructions or order of the commander of the convoy, without which the convoy itself may be of little use[v]. But if the commander refuse to give such instructions[w], or they cannot be obtained on account of the state of the weather[x], or other unavoidable accident excepted in the charter-party, that will excuse the master. If the proper instructions be not obtained, and there is no excuse for not obtaining them, it is the same as if the ship had sailed altogether without convoy.

Convoy Act, 43 G. 3. c. 57. Though there be no particular covenant for the purpose, it is in some cases of ships requiring registry, directed by act of parliament that they shall sail with convoy. Indeed it has been said that it may be considered as a general

[s] Hibbert v. Pigou, Park. c. 18. p. 443. [t] Lilly v. Ewer, Doug. 72. [u] Jefferies v. Legendra, Carth. 216. 3 Lev. 320. S. C. 2 Str. 125. [v] Webb v. Thomson, 1 B. & P. 5. Anderson v. Pitcher, 2 B. & P. 164. Cohen v. Hinckley, 1 Taun. 249, *per* Heath, J. [w] Veedon v. Wilmot, Park. c. 18. p. 444, note. [x] Victorin v. Cleeve, 2 Str. 125.

a general rule, though liable to the exceptions in the statute 43 *Geo.* 3. c. 57. that a private merchant vessel must not sail on a foreign voyage without convoy, unless by licence[y]. By that statute, the master is bound to use his best endeavours to continue with the convoy, and not separate from it, without the commander's leave, under heavy pecuniary penalties, as well as on peril of the consequences of rendering void the insurance. The cases upon a warranty or contract to sail with convoy, will, in general, be found to furnish the true construction of this act of parliament[z]. But it has been held, that the statute requires a sailing with convoy for the voyage, or for such part thereof as convoy is appointed to go; and that a ship cannot sail from port to port without convoy, unless bound from port to port: nor can the captain sail without convoy with a view of overtaking it; for if that were allowed, he might continue the voyage with that view, till within the smallest distance from its completion[a]. The 5th section of the act directs the officers of the customs not to permit any ship required to sail with convoy, to clear outwards from any place in the United Kingdom to foreign parts, until the master has given a bond with surety, not to depart without, or separate from convoy.

Upon the subject of the licence to sail with convoy, the following points have been determined; first, that if the licence be conditional, that the ship shall be armed and manned in a particular manner, it will not legalize the ship's departure, unless the condition be complied

Of the licence and bond required by that act.

[y] Abbot, 244, 5. [z] 1 Taun. 253, *per* Lawrence, J. *ante*, 45.
[a] Cohen *v.* Hinckley, 1 Taun. 249.

complied with[b]; 2dly, that if the licence be obtained for sailing without convoy to a particular place, the voyage is illegal, if the ship do not in fact sail for that place, as her licence imports[c]; 3dly, that if a ship with a licence clear outwards without giving the bond required by the statute, it is as a departure without licence[d].

Consequence of not sailing with convoy.

The consequence of the master's not sailing with convoy according to his covenant, may be his liability to an action for any damages happening to the cargo, though occasioned by the accidents excepted in the charter-party, from which he would have been exempt if he had pursued the directions contained in it; for the exception is only meant to protect him from such accidents, in case of his pursuing those directions. And if in confidence of the master's covenant, the freighter effects an insurance, with a warranty or stipulation that the ship shall sail with convoy, it seems that he may sue the master for that indemnity which by his misconduct or neglect he cannot obtain of the underwriters[e]. Nothing less than a warranty or covenant, &c. to sail with convoy will charge the captain or ship-owner; though such warranty may perhaps be *implied* from circumstances. It has been made a question, whether the mere expression in the advertisement of a general ship "to sail with convoy" means any thing more than that the ship is *intended* to sail with convoy, or can be construed as a warranty that the ship shall so sail, where the bill of lading makes no mention of convoy[f].

In

[b] Hinckley v. Walton, 3 Taun. 131. [c] Ingram v. Agnew, Abbot, 249. [d] Hinckley v. Walton, *supra*. [e] Abbot, 238. acc. [f] Snell v. Marryatt, Abbot, Addend. 644, 5.

In the same case another question was raised, namely, whether the endeavours of the captain to sail with convoy, and his being prevented from doing so by the wind, and the appearance of an enemy, would excuse the performance of a warranty or covenant of this nature[g]. In the case cited, an action was brought by the shipper of goods on board a general ship, advertised to sail with convoy for Grenada, and which had been captured; against the owner, for having sailed without convoy, in consequence of which the plaintiff had lost the benefit of his insurance. It was in fact intended that the ship should sail with convoy, but she was blown out of the docks in a gale of wind, when the master determined to go into Falmouth to wait for the convoy, but being prevented from doing so by the appearance of a French privateer, by which he was chased, he made sail for Grenada, and was afterwards taken. The defendant obtained a verdict; but the court granted a new trial to have the above points considered, and they were debated at some length; but the case was not taken down to a second trial[h].

Alteration of the time of sailing.

If a time be fixed between the merchant and the master, when the voyage is to be begun and finished, it cannot be altered by the supercargo, without special authority for that purpose[i]. This authority ought, it seems, to come from the freighter of the ship, or his correspondents or agents, as he is the only person who can complain of the time originally fixed not being observed. The time of sailing is not such a material

g Snell v. Marryatt, Abbot, Addend. 644, 5. h *Id.* i Mol. b. 2. c. 4. s. 6.

terial circumstance[j], as that the alteration of it amounts to an abandonment of the other terms of the charter-party, especially if it be under seal. This case differs completely from those where the time limited for performance of a contract by deed is material and issuable, and a parol licence is not allowed to dispense with the original stipulations; and all remedy upon the original contract being lost, the party is obliged to resort to his remedy upon the new agreement for the enlargement of the time[k].

Consequences of not sailing in time: Action for damages.

Molloy says, that if the master put to sea after the time fixed for his departure, and any damage then happens, he is answerable for the consequences[l]. It seems, that although it may be physically impossible to get out of port from the state of the wind, yet this or the like unavoidable circumstance will not protect the master from an action on his express contract, unless there be the usual exceptions in the charter-party. Such exceptions would undoubtedly have that effect; and if by any accident or inadvertence they be omitted, it cannot be worth while to sue fot the breach of a covenant, whereon no more than nominal damages can be expected; which is generally the case with the covenant in question, unless gross neglect or misconduct be the cause of the breach of it, which seldom happens. By the laws of Oleron and Wisby, when a seaman falls sick in the ship, the master ought to send him on shore, and if the ship be ready for her departure, he ought not to stay for the sick party[m]. This is very good advice, equally applicable

[j] *Ante*, 43, 4. [k] See 3 T. R. 590. 592, and the cases there cited.
[l] Mol. b. 2. c. 4. s. 6. [m] Leg. Ol. 7.

cable to the case of a general ship, and a contract of affreightment by charter-party; for if there be a covenant or agreement in the charter-party to sail on or before a certain day, or with the first fair wind, or with the first convoy, or the like, and there is no alteration of this part of the contract by competent authority, it is clear that although the non-performance of it will not, in general, furnish a defence to an action for the freight; yet it will subject the master, or his owners (according as the contract may be framed) to an action for any damages which may in fact be sustained in consequence of the breach of the charter-party, unless there be some sufficient excuse for the non-performance.

Discharging the ship, and rescinding the contract.

It is said by Malyne, that if the ship be not ready to go to sea at the day appointed by the charter-party, the merchant may recover damages, or discharge the ship[n]; unless the master has some excuse of unavoidable mischance; and then he loses only his freight, because he has not earned it[o]. But if the merchant do not discharge the ship, he shall be deemed by his silence to have consented to the delay[p]. If the fault be in the merchant, he shall pay the master his damages; and in that case, the master is said to be at liberty to rescind the contract[q]. According to the marine law, if there be no writing but only earnest given, the merchant, if he repent, loses his earnest; and the master, if he repent, loses double his earnest[r]. However, this must

[n] Mal. 98. [o] *Id.* Mol. b. 2. c. 4. s. 3. [p] Mal. 98. [q] *Id.* Mol. b. 2. c. 4. s. 3. [r] Mal. 98. Mol. b. 2. c. 4. s. 3. Sea Laws, fol. 52. c. 7. cites Rhod. 19.

must all depend upon the agreement of the parties; and it seems, that in either case, if the contract can be clearly proved by parol testimony, though it be not reduced into writing, whether earnest be given or not, the party breaking the agreement, is answerable to the other, to the full amount of his damages, by such breach of contract[s]. By the passage quoted from Comyn's Digest, and the marginal note affixed to it, perhaps it might be thought that if the contract were not reduced into writing, it might be dissolved at the pleasure of either party, upon his relinquishing any sum he may have paid as earnest to bind the bargain. But this is obviously in contravention of one of the first principles of the common law; that a contract once made cannot be rescinded, without the consent of both parties[t]; though it would certainly be otherwise, if it were expressly agreed that either party might be off the contract, on forfeiting his deposit. And if by the refusal or neglect of one of the parties to perform his part of the contract, the other is disabled from performing his, in law and reason, it will be an excuse for his non-performance. With respect to an express discharge of a contract by charter-party, which is always in writing, there is this distinction, that if the contract be not under seal, it may be discharged by parol or writing before breach; but if it be under seal, or though not under seal, if it be broken before the party is discharged, he can only be released by a sealed instrument[u].

The

[s] Mol. b. 2. c. 4. s. 3. *Sed vide* Com. Dig. tit. Merchant, E. 7. *Semb. contra.* [t] Abbot, 193. acc. [u] Langden *v.* Stokes, Cro. Car. 383.

The marine law has settled what freight is, what services it includes, and also that it is divisible, which is contrary to the principles of the common law. At common law, all the expences of loading are included in the freight; and if the party be not entitled to freight, he can demand no satisfaction for loading. The inception of freight is, in general, breaking ground. In the law of insurance indeed, this doctrine is not holden so strict; for by that law, if the goods be so situated as to create a well grounded expectation of freight becoming due, the freight is insurable and recoverable; but that does not affect the marine law as to freight, in cases between the ship-owners and freighters. According to that law, no freight commences till the ship has broken ground. And therefore where a ship, before she had broken ground, was captured in the river, and the contract was, to load the goods on board and bring them to England for a certain price, no freight could be recovered upon it, either by the marine, or the common law[v]. Breaking ground.

We have seen, that the master ought not to put to sea at an unseasonable time[w]. On this subject, the laws of Oleron and Wisby declare that the master ought before he departs to advise with his company, as to what they think of the weather; and if they differ he is to concur with the major part. Upon failure of this if the ship should be lost, he shall make good the loss[x]. So, if any damage in such case Putting to sea in bad weather.

[v] Curling v. Long, 1 B. & P. 636. [w] *Ante*, 40. [x] Leg. Ol. 2.

case happen to the vessel during the voyage he shall be answerable for it[y]. But no questions as to such liability arise at the present day, on account of the exceptions universally introduced into charter-parties and bills of lading, against the perils and dangers of the seas, &c. which exceptions protect the master and owners from any liability for accidents arising from the state of the weather, unless they are occasioned by the want of sea-worthiness in the ship. Indeed independently of those exceptions, whatever may be the marine law upon the subject, it is certain that by the common law, especially in the case of an express contract of affreightment, the party to the contract must be answerable for the performance of it, whether or no he acts upon or takes the advice of others.

Sailing direct to a certain port.

It does not clearly appear whether in the case of Cole and Shallet before quoted[z], it was stipulated in the charter-party that the master should proceed direct to Barcelona, her port of discharge; but however that might be, it seems that no deviations from the appointed course of the voyage will afford a defence to an action on a charter-party, for the freight; although the goods may be, in consequence of such deviations, spoiled. In a late *Nisi Prius* case, the charter-party, by which the ship was freighted contained the following clause. "The "freighter binds himself to load the ship with "the greatest expedition with a full cargo of "masts,

[y] Leg. Wis. 14. [z] 3 Lev. 41. *Ante*, 44.

" masts, &c. with which cargo the captain must " sail, with the first favorable wind, *direct* to the " port of Portsmouth." The freight agreed upon was so much *per* load of masts, &c. The vessel had arrived at Portsmouth, and the defendant had accepted her cargo; but, his case was that she had not sailed *direct* to that port, but unnecessarily put into Copenhagen where she was detained, which deviation made fresh insurances necessary upon her cargo. It was contended, that the plaintiff's sailing with the first favorable wind, direct to Portsmouth, was a condition precedent to his right to freight; and that at all events the damage sustained by the deviation might be given in evidence, to reduce the plaintiff's demand. But Lord Ellenborough, C. J. was of opinion, that the circumstance in question was not a condition precedent; and that the defendant having accepted the cargo, must pay the stipulated freight. His Lordship observed, that to hold that any short delay in setting sail, or any trifling departure from the direct course of the voyage, would entirely destroy the plaintiff's right to freight, would indeed be going into *apices facti*. If the plaintiff had proceeded merely on a *quantum meruit* for an indefinite sum, the plaintiff might have reduced the damages, by shewing a deficient performance of the contract; but there being a specific agreement for certain freight, which the plaintiff claimed and had a right to recover, the defendant must bring his cross action for any loss he might have suffered from the plaintiff's default[a].

The

[a] Bornman *v.* Tooke, 1 Camp. 377. But see Bastin *v.* Buter, 7 East 479. Farnsworth *v.* Gerrard, 1 Camp. 38.

Must proceed to loading port, though not certain of cargo.

The distinction between *implied* covenants, by operation of law, and *express* covenants, by the act of the parties, is, that the latter are taken more strictly; and although a consideration is necessary to support a parol contract, a man may without consideration enter into an express covenant under hand and seal. Where the party has bound himself by such express covenant, and broken it, he is liable to an action, whether any *fault* be imputable to him or not; and whether the plaintiff, or defendant, or both, may have lost only a *chance* of benefit from the contract. Therefore an action of covenant lies upon a charter-party of affreightment, by the merchant hiring the ship, against the master, for not going to the lading port; although the charter-party contain a proviso, that if the ship should not arrive at the port by a certain day, it should be at the option of the plaintiff, on the ship's arrival there, either to load the ship, on the terms of the charter-party, or not, or at the then current freight, or to refuse the ship entirely[b]. In the case cited, it does not appear that the defendant covenanted to arrive at the port in question by any given day, but to proceed as soon as wind and weather would permit. The declaration assigned two breaches, first, that the ship did not sail and proceed to the port at all; and secondly, that it did not arrive there on the day, or at any time afterwards, but on the contrary, the defendant wilfully absented himself therefrom. The defendant pleaded that he sailed with all convenient speed, and proceeded to another port, but by reason of contrary

[b] Shubrick *v.* Salmond, 3 Burr. 1637.

contrary winds and bad weather, he was prevented from proceeding to or arriving at the port in question,. by the appointed day; which pleas were held bad, on general demurrer, for the above reasons. Lord Mansfield, in giving judgment, observed that the defendant had covenanted absolutely to go to the port in question; and the proviso, in order to quicken the ship's arrival there, stipulated that if the ship arrived by the appointed day, she should be certain of a freight and, if not that she should yet have the chance of one: the defendant therefore became an insurer of the risk of his getting there before that day. Mr. Justice Wilmot said, that if the defendant had not *expressly* covenanted to go to this port, and had been unavoidably prevented without any default in himself, it might have been a different case; but the defendant having bound himself by an express covenant to go to that port, the proviso would not excuse him for not going there at all, because he could not get there so soon as that day[c].

Where it was stipulated in the charter-party, that the vessel should be at the disposal and direction of the freighter, his agents and assigns, for three months, and should proceed to any port or ports in Spain or Portugal, or either, as should be ordered by the freighter, his agents or assigns; and the master proceeded to Lisbon, according to orders, and there delivered the cargo, it was held no answer to an action on the charter-party for the freight of such voyage,

After port once fixed and bills of lading signed, it cannot be altered.

c Shubrick v. Salmond, 3 Burr. 1639, 40. *Et vide* Al. 27.

voyage, that after the vessel had sailed from London, and before her arrival at Lisbon, the freighter had ordered the master to proceed to Gibraltar, and there deliver the cargo, which order had been disobeyed. A plea to that effect was held bad, on general demurrer[d]. In the course of the argument Lord Ellenborough said, unless the first order was contradicted by the second, the court would if possible make the two orders consistent; and there being no incompatibility upon the face of them, they might well stand together[e]. "His Lordship said, "supposing there had been a written order to "proceed to Lisbon *and* Gibraltar, would not that "order have sustained the allegation in the declara-"tion, that the master was ordered to proceed to "Lisbon?" And as to the objection, that the partial performance of the orders given might have frustrated the whole intention of the voyage, Le Blanc and Bayley, J. said, that the freighter and his agents, having accepted the goods at the port where they were discharged, could not afterwards make that objection. Bayley, J. observed, that the master had signed bills of lading for Lisbon under the freighter's order, by which he had bound himself to deliver the goods there to the consignees. Afterwards, Lord Ellenborough, in delivering judgment, said, the question was, whether the ship having been first ordered to proceed to Lisbon, and goods loaded, and bills of lading signed by the plaintiff for that port, a subsequent order, given by the freighter to go to Gibraltar, was a bar to the plaintiff's claim for the freight,

[d] Davidson v. Gwynne, 12 East 381. [e] *Id.* 387.

freight, out to Lisbon and back again to London. Now, after the freighter's order to the captain to go to Lisbon, and the latter had received on board, goods, and signed bills of lading for that place, it was not competent for the freighter to countermand that order; he could not capriciously change the destination of the vessel, without recalling the bills of lading, or at least offering sufficient indemnity to the captain against them. But nothing of that sort was stated. The case then stood thus, that the freighter, after giving an order to the captain to go to Lisbon, and suffering him to bind himself by signing bills of lading to deliver the goods there, gave him another order to go elsewhere, and make himself liable to actions for the breach of his engagement upon all those bills of lading. This the freighter had no right to do; and therefore the breach of that subsequent order, afforded no bar to the plaintiff's claim for freight for the voyage which he prosecuted under the first order, and to the prosecution of which he had bound himself by the bills of lading before he received such second order[f]. Grose, J. said, after the first order given to go to Lisbon, under which goods had been received on board, and bills of lading signed, by which the master made himself liable to answer in damages to the owners of the goods if he did not carry them according to his undertaking, it could not be permitted to the freighter to countermand the voyage, and make the master liable to actions by those to whom he had so bound himself[g]. One of the laws of Wisby is, that if a ship freighted for one harbour is forced to put into another, the master

[f] Davidson *v.* Gwynne, 12 East 389, 90. [g] *Id.*

ter to clear himself must declare upon oath, together with two or three of his ablest mariners, that he was forced into that harbour by stress of weather, or otherwise; and upon that the master may take his course again and finish his voyage, or else he may send the lading by other ships at his own costs, and then he shall be paid his freight[h]. Whether the ship be a general or a chartered vessel, in such accidents as those adverted to by this law, it is certainly prudent and right to make a protest of them; though such protest is not by the common law necessary, to support an action for the freight, or even evidence in such action.

So near thereto as the ship can safely get.

Where the agreement is to sail and proceed direct to such a port, we have seen that any deviation in proceeding there will subject the captain or owner to an action; and in such case, it is necessary to sail to the port itself. But circumstances may, and frequently do occur, which render it unsafe for vessels to sail direct to her loading port or port of discharge; and where there is any danger in her doing so, it is usually agreed that she shall sail to the port, "or so near thereto as she may safely get," in which case it is not necessary to sail to the port itself. It may become a question, what is a sailing so near thereto as safety will allow; which must depend upon the circumstances of each particular case, whether the danger apprehended be that of falling into the enemies hands, or incurring a confiscation of the ship or cargo, from offending against any foreign ordinance or regulation, or that arising from

[h] Leg. Wis. 53.

from the shallowness of the coast, or rocks, shoals, or the like.

Consequences of putting into a foreign port.

Molloy says, if the ship put into any other port than what she was freighted to, the master is liable in damages to the merchant[i]. Again it is said, by him and Malyne, that if a ship enter any other than her destined port, though against the master's will, as, by a storm or the like, the goods must be conveyed to that port at the master's expence[j]. These authors, of course, do not contemplate the existence of the modern exception of such perils in the charter-party, by which clearly the master will be excused, if he be thereby prevented from reaching the destined port. In the event of an accident it is said, that the master and two of the mariners should make protest of the fact before the proper officer, at the first opportunity, or else there may be further danger; which seems to mean by loss of the freight[k]. Beawes observes, that when a ship puts into any other port than she is bound to by the charter-party, the master is liable to answer for all damages that may happen thereby; and if the master voluntarily and without good reason put into such port, and materially deviates from the voyage, perhaps the right to freight may be thereby affected, though the ship afterwards reach her destined port, and make a right and true delivery of the goods. For it cannot be said in such case, that the goods have been carried the voyage contracted for; nor can the master have it in his power to go wherever he pleases, and put the merchant to his action for damages; but at all events, the

[i] Mol. b. 2. c. 4. s. 10. [j] Mal. 99. Mol. b. 2. c. 4. s. 9. [k] Mal. 99.

the former by such conduct will subject himself to pay damages, and the amount will be in the reasonable discretion of a jury. If the master was forced into the foreign port by storm, enemies or tempest, that will certainly not affect the right to freight, if the voyage be afterwards completed[1].

Captain cannot abandon voyage, though hopeless to complete it.

The captain has no right, under any circumstances of difficulty, to put an end to the voyage and sell the goods, though expediency may require it. If, therefore he put an end to the voyage, (finding the attempt to complete it hopeless,) and sell the goods without authority from the owner, he is guilty of a tortious conversion, whatever power he may have to sell part of the cargo for repairs. In an action against the defendants as owners of the ship, on a bill of lading signed by their captain, for two cases of cutlasses shipped to be carried from England to Surinam, with the usual exception of the act of God and accidents of the seas, &c. it appeared that the ship sailed in June under convoy with other Surinam ships, and by the error of the commodore they got to leeward of that settlement; and having ineffectually endeavoured to beat up to windward, they were forced to put into Demerara towards the end of August, and remain there till December, when a ship of war arrived to convoy them to Surinam; but after nine or ten days beating about, they were carried farther to leeward. The commodore then finding the attempt hopeless, gave orders to make for Grenada, where the vessel put in, and the goods were sold by auction under the captain's

[1] Beawes, 137.

captain's directions. The Attorney-General contended that the captain, under such difficult circumstances, was to be considered as the agent of the shipper of the goods, as well as of the ship-owner; that the defendants had not been guilty of a breach of contract, the captain having done every thing in his power to reach Surinam, and been prevented from one of the risks excepted in the bill of lading. But Lord Ellenborough held, that the captain could not put himself in the situation of the owner of the goods, or make an end of the voyage; and it was difficult to say, whether there was a natural impossibility of performing it. His Lordship thought the sale in this instance an injurious conversion. The plaintiff had a verdict[m]. It should seem that the action might have been *assumpsit* for non-delivery of the goods, or in trover; or the plaintiff by proceeding in case might have declared both ways. But what the form of action really adopted by the plaintiff, or how he declared, does not appear; though, as it is said that the action was on the bill of lading, and his Lordship spoke of the sale of the goods amounting to a conversion of them, it seems that the plaintiff had declared in case, as above suggested. That seems the most advantageous mode of declaring; unless indeed the captain had received the produce of the sale, in which case the opportunity of adding a count for the money so received, might have been a reason for preferring the action of *assumpsit*.

The person intrusted with the command of the ship is captain for the voyage originally agreed upon, and on

Nor can he alter the voyage.

[m] Van Omeron *v.* Dowick, 2 Camp. 42, and see Mackenzie *v.* Rowe, *Id.* 482.

on which the vessel sailed, and as such he has no power to change that voyage for another. He may be invested with complete controul as to her employment and destination, but that is superinduced upon his authority as captain; therefore, to shew that the commander can do away the contract entered into by the owner, and conclude a fresh contract binding on both parties, it is not sufficient to prove that he was captain of the ship[n]. The case cited was that of an action for freight and demurrage, on a memorandum for charter, for a voyage from Buenos Ayres and back. When the ship arrived in the river Plata, it was found that Buenos Ayres had been recaptured by the Spaniards; she then went to Monte Video, where her outward cargo was accepted by one of the defendants, who desired t at she might wait for a return cargo, but which finally could not be procured. The plaintiff contended, that Monte Video had, under these circumstances, been substituted for Buenos Ayres, and therefore the defendants were liable, the same as if the ship had performed the voyage for which she was chartered; and that the captain represented the plaintiff, and had authority to make this substitution. But Lord Ellenborough held otherwise, and the cause was afterwards referred[o]. If the plaintiff declared specially upon the memorandum for charter only, whether he averred, that the original voyage was performed, or another substituted for it, it is clear that he could not recover, whatever might be his claim to a compensation for the benefit received by the defendant's acceptance of the goods, at a different port from that to

[n] 2 Camp. 529, *per* Lord Ellenborough. [o] Burgon *v.* Sharpe, 2 Camp. 529.

to which she was originally chartered; for in the first case, there was a clear variance as to the voyage, between the declaration and evidence; and in the second, there was as clearly no performance of the voyage in the charter-party, or excuse for the non-performance of it; at all events, if the charter-party was under seal[p]. Supposing the acceptance of the goods by one of the defendants, and his directing the ship to wait for a return cargo was (as it seems to have been) sufficient evidence of a new contract, to pay the plaintiff a reasonable compensation for the carriage of the goods and detention of the ship, the plaintiff might have declared in *assumpsit* specially on such new contract, or generally by way of *indebitatus assumpsit*. But what the contract, or nature of the action, or declaration was, does not appear by the report.

What he may do, if ship disabled or detained.

According to Malyne and Molloy, if the ship in her voyage become disabled or detained, without the master's fault, he may either repair his ship, or freight another[q]; and although the merchant do not agree thereto, the master shall at least recover his freight, so far as he hath earned it. But unless the merchant consent, or necessity constrain the master to put the goods into another ship worse than his own, the master is liable to all losses and damages; except both ships perish in the voyage, without any fault or fraud in the master[r]. If the master provide another ship, he must see that it is sufficient and sea-worthy, as the ship originally freighted was agreed to be by the terms of the charter-party[s]. At all events, it must be apparent that

[p] See Smith *v.* Wilson, 8 East 437. [q] Mal. 98. Mol. b. 2. c. 4. s. 5. [r] *Id. Ibid.* [s] Mal. 98.

that that ship seemed, or was probably sufficient, to excuse the master, if it sink or perish[t]. By one of the laws of Wisby it appears, that if the ship run aground by accident without fault in the master, he may cause part of the cargo to be transported into other vessels, and the charge thereof shall be upon account of the ship and her lading. In such case protest is directed to be made, that it was necessary to save the ship and her lading[u]. It would be well if such emergencies were provided for by special clauses in the charter-party, which might be so drawn as more effectually to answer the intentions of the parties, than any arrangements which may otherwise be made for them.

What power he has, to pledge or dispose of the goods.

The master may hypothecate, but cannot sell the goods. One question which arose in the case of Johnson and Greaves[v] was, whether the captain had a right to pledge or dispose of the goods of the consignees, as he did. In that case, the vessel and cargo having been seized by the Dædalus frigate, on pretence that part of the goods had not been shipped in return for the outward cargo, within the scope of the licence, the captain of that frigate sent them into Jamaica, where he restored to the master seventy-three bags of coffee, which had been purchased with the produce of goods directly exported from London, and libelled the rest of the cargo as prize in the Vice-Admiralty Court of Jamaica. In order to procure the restoration of the rest of the cargo for the owners of it, and earn the freight for the ship-owners, the master agreed with Dicks and Co. that they should give bail for that purpose,

[t] Mol. b. 2. c. 4. s. 5. [u] Leg. Wis. 55. [v] 2 Taun. 344.

purpose, for which he proposed to secure them, by giving them *the* bill of lading of seventy-three bags of coffee to secure all costs and charges, and bills of lading for the rest of the cargo, as upon their shipment, for delivery to their order, *freight as per agreement*, to secure the payment of their bills to be drawn upon the consignees of the several parts of the cargo; that the goods should be sold in England, and the net proceeds delivered to Taylor and Hughan, the agents of Dicks and Company; that if the net proceeds should fall short of the amount, the owners of the ship should only be entitled to reduced rates of freight for the goods; and that if the drawers of the bills of exchange should refuse to secure the payment to the satisfaction of Taylor and Hughan, they should be at liberty to insure, and charge the expence of insurance to the sales. The Court of Vice-Admiralty at Jamaica condemned the goods, and upon appeal to the Admiralty Court here, that sentence was reversed, but upon payment by the owners of the captors' costs. Mansfield, C. J. in delivering the opinion of the court, said, he did not go into the question, whether the captain had a right to pledge the seventy-three bags, being not libelled; he however pledged the whole of the property, and added a very singular condition, that the whole of the proceeds should be remitted to Jamaica, which must again be remitted hither, probably in goods; upon all which remittances commissions were due. What a condition then the freighter was put into! for Dicks and Co. or their agents were not only to have the disposal and sale of the goods, but the disposal of the proceeds to send them to Jamaica; and till the proceeds came back, and

 when

when all the claims of Dicks and Co. and their agents were discharged, to trust to the surplus, if any. Had the captain a power to dispose of the goods in this manner? In a case of necessity as this was, the captain may pledge or hypothecate; but it was contrary to the very idea of a pledge, that the goods, instead of being redeemed, were to be sold, and the proceeds sent to Jamaica[w].

[w] 2 Taun. 357, 8.

CHAPTER

CHAPTER IV.

OF THE DELIVERY OF THE GOODS.

IN this chapter, it is proposed to consider that part of the duty of the master or owner of the ship, arising out of the charter-party, which relates to the delivery of the goods; and to shew, 1st, where there must be a delivery, and what is or is not equivalent thereto; 2dly, what delivery is sufficient in respect of the port or place at which, and the persons to whom it is made; 3dly, where a full and complete delivery is or is not a condition precedent to the recovery of freight; and lastly, the consequences of there not being such a delivery as is required by the charter-party.

Division of chapter.

Once for all it may be observed, that in the construction of a charter-party or other instrument, as to what is a condition precedent, it makes no difference whether the question arises on a precise formal contract under seal or not. Where, by the terms of the charter-party, (which was under seal,) the defendant engaged to pay so much on delivery of the goods at Liverpool, one-fourth in cash on her arrival, and the

No difference, whether charter-party be under seal or not.

the remainder by an acceptance at four months; but the goods never arrived, the ship having been wrecked on her voyage: it was held that the plaintiff could not recover freight either on the charter-party or a *quantum meruit*, though the defendant accepted the goods. He could not recover upon the former, because the delivery at Liverpool was a condition precedent to the payment, and it could not be ascertained at what time the bills should be dated; nor could he recover on a *quantum meruit*, for there being an express agreement between the parties, that put an end to any tacit or implied one, according to Lord Coke's maxim, *expressum facit cessare tacitum*. Nor could it be argued, that the unreasonableness of the contract should prevent the court from giving effect to it[a]. In the case cited, it was not necessary however to determine, whether the plaintiff might not have brought an action of *assumpsit*. But it has been held, that where the owners of a ship have expressly contracted for its affreightment by a charter-party under seal, they cannot be *charged* as to the subject matter of that contract, in respect of the bills of lading signed only by the master, and not under seal[b]; and it is equally reasonable, that they should not be allowed to avail themselves, in such case, of the bills of lading as evidence of a contract with them, as owners of the ship, to pay the freight, where it would not be recoverable under the charter-party, for want of the performance of any condition or covenant contained in it on their part.

Where

[a] Cook *v.* Jennings, 7 T. R. 381. [b] Hunter *v.* Princep, 10 East 378.

Where the arrival of the ship at its port of discharge, and a delivery of the goods are made an express condition precedent to the payment of freight, such arrival and delivery must always be averred and proved; for nothing will amount to a performance of the condition but a strict compliance with its provisions, or an express waiver and dispensation with such compliance, where it is in the power of the party to obtain a right to the sum claimed by performance[c].

Where there must be a delivery.

A mere endeavour to perform the charter-party, where performance is out of the power of the plaintiff, is insufficient, though the defendant, in such case, release him from actual performance. In an action of covenant on a charter-party for non-payment of the freight, &c. the material covenant on the part of the plaintiff was, that the ship being arrived at her destined port, the commander should make a right and true delivery of her cargo to the freighter, agreeably to the bills of lading; and the defendant's covenant was to pay so much *per* month for the time the ship should be employed, during the intended voyage to Monte Video and back to her port of discharge, in full for the freight during such voyage, to commence when she should be ready to receive her cargo, and end when she had finally discharged it; and also to pay pilotage and port-charges during the voyage; such freight, &c. to be paid *on the arrival and discharge of the ship at her destined port in Great Britain.* The declaration stated, that while the ship was prosecuting her outward voyage, she was, without the

A mere endeavour to make delivery, where not sufficient.

[c] Jones v. Barkley, Doug. 684. Hotham v. E. I. C. 1 T. R. 638.

the plaintiff's default, wrongfully seized and detained for a long time, at the expiration of which she was liberated; that it then became necessary to refit the ship, which was done accordingly; and that the plaintiff, from the time of the ship's being liberated and refitted, was ready to cause her to complete the voyage; that he tendered her to the defendant for that purpose, and requested him to give the necessary directions and instructions; but that the defendant refused to do so, and renounced the further prosecution of the voyage, and discharged the plaintiff therefrom, and dispensed therewith. The declaration then stated, that the ship was employed during the voyage for twelve months; and that the freight, according to the rate in the charter-party, amounted to so much; that if she had been employed by the defendant to complete the voyage an additional freight would have been earned, amounting to a like sum, for the like period of time; and that the agreed proportion of the pilotage and port-charges amounted to a further sum. It then assigned a breach in the non-payment of the freight, pilotage, and port charges, so claimed. To this declaration there were seven pleas, upon the three first of which issues in fact were taken, to the three next there were demurrers, and to the last there was a special replication, upon which issue was taken by the rejoinder. The question of law arose upon the demurrers to the fourth, fifth, and sixth pleas, the substance of which however it is unnecessary to state, because the court, assuming them to be bad in law, held that the defendant was nevertheless entitled to judgment, because the declaration was bad in substance. The ground of their decision was, that by the terms of the charter-party the freight, pilotage and port-charges, were all expressly

expressly covenanted to be paid on the arrival and discharge of the ship at her destined port in Great Britain, and therefore *such arrival and discharge* was a condition precedent to the plaintiff's right to demand them. And if the plaintiff had done all that he offered to do, and which the defendant discharged him from doing, still it would have amounted at most only to an *endeavour* to complete the voyage, and procure the arrival and discharge of the ship at her destined port; for the actual happening of that event did not depend upon him, but was liable to be disappointed by all the various accidents to which marine adventures are subject. The court, in giving judgment, distinguished the case from those of Jones against Barkley, and Hotham against the East India Company[d], where, by doing an act in the power of the party, he would have acquired a full and instant right to the duty demanded. They said, covenants of this kind had always received a strict construction, adverting to the cases of Bright and Cooper[e], and Cook and Jennings[f], which they observed proceeded upon the same principle. Judgment was therefore given for the defendant without considering the sufficiency of his several pleas[g].

If indeed the freight or demurrage be made payable on the ship's *discharge or return*, it will be claimable on the charter-party, if the ship be discharged by the act of the freighter before her return; and it has been held that in such case, if the ship be accidentally burnt before her return, that circumstance will operate as a discharge of her from the freighter's employment, the same as a discharge

What discharge will excuse the master.

[d] Doug. 684. 1 T. R. 638. [e] 1 Brownl. 21. [f] 7 T. R. 381.
[g] Smith *v.* Wilson, 8 East 437.

a discharge by his own act; and consequently he is liable to any allowance covenanted to be paid by him on the ship's discharge[h]. On the other hand it has been determined, that the ship continues under the charter-party, notwithstanding any alterations may be made, to fit her more conveniently for the voyage or expedition for which she is chartered; and therefore as the East India Company are authorized to employ their ships in warfare, the fitting of them with additional works, and putting them under the command of King's officers for that purpose, will not annul the charter-party, any more than the alteration of a rope or plank; so that the Company cannot, on that account, be sued for any compensation other than or beyond that limited by the charter-party[i].

Right delivery, what.

Right delivery of the cargo means a delivery at the port mentioned in the charter-party, after the performance of the voyage. In a late case it was held, that where the charter-party contained an express condition precedent that the freight should be payable on right delivery of the cargo, and by any circumstance that is prevented, and the merchant will not accept the cargo, no sum is payable for freight or demurrage[j]. In the case cited, the voyage contracted for was from Shields to Lisbon, but the ship returned to Portsmouth, where the goods were relanded and sold without prejudice to either party, in consequence of the occupation of Portugal by the enemy. Lord Ellenborough observed, that the plaintiff should have provided in his contract for that emergency; but having entered

[h] Havelock v. Geddes, 10 East 567. *Et vide ante*, 52. [i] Dobree v. E. I. C. 13 East 555. [j] Liddard v. Lopez, 10 East 526.

entered into a special engagement, by which freight was made payable in one event only, namely, that of a right delivery of the cargo; according to the terms of the contract, that event not having taken place, he was not entitled to recover[k]. If the master be disabled from completing the voyage in the ship originally freighted, and there be no express provisions in the charter-party to bind the master or owner to earn the freight by that ship alone, it seems that he may entitle himself to the whole of it, by forwarding the goods by some other means to the place of destination, though perhaps then his right to freight is rather under a new implied contract, than that contained in the charter-party: and he has no right to any freight if the goods are not so forwarded, unless the forwarding of them be dispensed with, or there be some new bargain upon the subject. If the ship-owner will not forward the goods the freighter is entitled to them without paying any thing. The general property of the goods is in the freighter, and the ship-owner has no right to withhold the possession from him, unless he has either earned his freight or is going on to earn it[l].

Arrival of ship at port of delivery, where necessary.

Where the arrival of the ship is, by the charter-party, made a condition precedent to the payment of freight, in an action for the freight it is necessary to aver and prove such arrival, according to the terms of the charter-party. What will constitute a condition precedent in such case must depend on the intention of the parties, as expressed by the contract of affreightment. In the following case it was held that the

[k] Liddard v. Lopez, 10 East 526. [l] *Per* Lord Ellenborough, Hunter v. Princep, 10 East 394.

the return of the ship to her port of discharge was a condition precedent, and therefore necessary to be averred and proved in an action for the freight. The plaintiff let a ship on freight to one Boothby, and covenanted that it should sail with the first wind to such a place, and the defendant covenanted, for Boothby, that *for the freight of all the premises* he would pay the plaintiff such a sum, for which the action was brought; after judgment for the plaintiff error was brought, on the ground that the declaration did not alledge that the ship came to her port of delivery. Yelverton, J. stated the difference to be, that where the payment is to be made on performance of a matter precedent, there always the party must alledge the performance of such matter to entitle himself to the payment; although it is otherwise where the performance is to be subsequent to the payment. In the principal case therefore he held, that the covenant being to pay so much *for all the freight* the plaintiff must, to entitle himself to the money, expressly state the performance of his part of the contract, such as the preparation, sailing, and return of the ship, which was not alledged. Flemming, C. J. seems to have been of the same opinion: he said, if the covenant were that the plaintiff should take the goods on board his ship and transport them, and the defendant covenanted to pay him so much for the same *when he returned to London*, the former must shew his taking of the goods and transporting of them, and also his return. Williams, J. agreed in opinion with the other judges, on the principle mentioned by Yelverton, J. that there being matter to be done by the plaintiff to entitle him to the money, viz. the preparing of the ship, and lading and transporting the goods, he could not

not recover without alledging performance. For these reasons the declaration was held bad, and the judgment erroneous, by the three judges present; but the court not being full they adjourned, and the judgment of reversal was not pronounced[m]. The ground of this decision seems to be, that a gross sum was payable for the freight of one entire voyage; for if one covenant to transport goods from place to place, and the other covenant to pay him so much for each delivery, these are several covenants, and the former may have an action for non-payment of the sum due for the carriage to any one of the appointed places[n].

Delivery at port substituted by the parties.

There is no doubt but that if the delivery at one place be, in the contemplation of the parties, substituted for delivery at another, it may be averred in an action of covenant on the charter-party. There cannot, indeed, be any material fact in a cause which may not be put upon the record, or given in evidence under the general issue. And by receiving part of the cargo at the substituted port, the freighters waive all objections concerning the delivery at that port[o]. In the case cited, the charter-party stipulated for the payment of freight and demurrage upon the express condition of the ship's arrival at London in safety; and that in case she did not arrive in safety there, and make right delivery of the whole cargo, the Company should not be liable to pay freight or demurrage. On her return home she was stranded off Margate in a storm, and a great part of her cargo lost. The rest was damaged by the sea-water, but got out of the ship by

[m] Clarke v. Gurnell, 1 Buls. 167. [n] *Per* Williams. J. *Id.* [o] Hotham v. E.I.C. Doug. 277.

by persons sent down by the Company, and brought to town in other vessels; and great expence was incurred to render it at all marketable. The ship was ultimately raised out of the water, and brought to London; and it was held, that the defendant's acceptance of part of the goods, in the manner stated, though it was nothing more than what justice required, rendered them liable to freight for all that were saved, and demurrage[p].

At port appointed by freighters' agents.

So, delivery at a port appointed by the freighters' agents, though not named in the bill of lading, is sufficient. In the case of Shepard and De Bernales, the second question was, whether the plaintiff was warranted in going, as he did, to the port of *Cadiz*, (*Tangiers* and *St. Lucar* being alone mentioned in the bills of lading), and making a delivery there, though the charter-party stipulated for delivery at *Tangiers*, or *St. Lucar*, or *Cadiz*[q]. But it was held, that the omission of Cadiz in the bills of lading was in effect for the benefit of the captain, to relieve him from the necessity of going there, if he should be willing so to do, and the defendant's correspondents should desire it. And as they chose to accept at *Cadiz*, instead of at either of the other places, there was no reason why they should not be at liberty to do so[r].

By supercargo.

Where it was stipulated in the charter-party, that the vessel should be at the disposal and direction of the freighter, his agents and assigns, for three months, and to proceed to any port or ports in Spain and Portugal, or

[p] Hotham *v.* E. I. C. Doug. 277. [q] 13 East 569. [r] *Id.* 573.

or either, as should be ordered by the freighter, his agents or assigns; and the master agreed to receive on board at London two supercargoes, to be appointed by the freighter, and convey them free of passage-money; the master at first received orders from the freighter to proceed to Lisbon, and afterwards was directed to go to Gibraltar; but the supercargo before the vessel sailed ultimately directed the master to proceed to Lisbon; and the master according to such orders made delivery of the goods at Lisbon; which was held sufficient to enable him to recover the freight. For a supercargo, unless specially restrained by the freighter, has authority to alter the destination of the cargo and the course of the voyage, within the limits of the charter-party; nor did the previous alteration of the voyage by the freighter operate as such a restraint of his authority. And upon an issue whether the freighter himself ordered the ship to proceed and make delivery of the goods according to her ultimate destination, it may be proved that such orders were given by the supercargo . It is matter to be left to the jury, whether, in point of fact, the supercargo ultimately concurred with the master in the original destination of the vessel to Lisbon[t].

His general powers to alter the voyage, &c.

A supercargo, unless his authority be expressly or impliedly restrained, must, from the nature of his employment, be invested with a complete control over the cargo, and every thing which immediately concerns it; that clearly embraces its destination[u]. It is necessary from the nature of his agency, that he should have

[s] Davidson v. Gwynne, 12 East 381. [t] *Id.* 394. [u] 12 East 396.

have power to alter the destination of the cargo, particularly in time of war. He may receive recent intelligence, that the port of destination last fixed by his principal is blockaded; or other circumstances, not less important to the success of the adventure, may intervene[v]. From the nature of the appointment of a supercargo, where he is on board the ship and the freighter is absent, it follows that he should have the same power in this respect as the freighter himself; for he is to take advantage of every circumstance as it arises, to act for the benefit of his employer in the adventure. If indeed the charter-party be made for a certain voyage, that is a very different consideration. The above observations were made with reference to a charter-party giving the freighter authority (unless restrained by circumstances) from time to time, by himself or his agents, to alter the destination of the vessel and cargo within the limits assigned[w]. The power of a supercargo will depend much on the nature of the voyage, and whether the destination be fixed at the time the charter-party is executed, or is afterwards to be fixed by the freighter or his agents[x].

Delivery at wharf, *qu.* if sufficient?

The stipulation in the charter-party is, that the ship shall proceed to her port of discharge, or so near thereunto as she may safely get, and deliver her cargo. The ship's inability to proceed to her port of discharge, and the circumstances which may make it unsafe for her to go directly to the port itself, have already been considered[y]. But although there be not any such inability, and no such circumstances occur, it may yet be a question

[v] 12 East 397. [w] *Id.* 397, 8. *Per* Le Blanc, J. [x] *Id. Per* Bayley, J.
[y] *Ante*, 60.

a question as to what delivery the captain or owners are bound to make by virtue of the charter-party, and whether delivery at a wharf belonging to the port of discharge will not be sufficient, or it must be made to the persons of the consignees or their agents. If there have been any previous transactions of affreightment between the parties, or any particular usage or course of trade adopted with other persons' goods[z], that may regulate the construction of the contract. If there be any fraud, that cannot afford protection, although it may produce a prejudice to the party practising it; but fraud cannot be presumed. In the case of Hyde and the Trent and Mersey Navigation Company[a], Lord Kenyon appears to have considered, that the extent of obligation to which common inland carriers are subject, would limit that of the owners of ships bringing goods from foreign countries to merchants in London; and that in the latter case, the owners were not bound to carry the goods to the warehouses of the merchants here, but have discharged their duty on landing them at the wharf to which they generally come. His Lordship observed, that it would be strange indeed, if the owners of a West Indiaman were held liable for any accident that happened to goods brought by them to England, after having landed them at their usual wharf. In the case cited, it became unnecessary to decide the general question as applicable to inland carriers, on account of the charge made by the defendants in one of their bills, for the cartage at Manchester; in respect of which charge it was held, that

[z] Golden v. Manning, 2 Blac. 916. [a] 5 T. R. 389.

that they had undertaken to *deliver* the goods. On the general point, Lord Kenyon declared he had great doubts; though the leaning of his mind was, that carriers were not liable for the safety of goods till they were delivered to the consignee[b].

Reasons to the contrary.

But Ashhurst, J. intimated a different opinion on the subject. He said, that a contrary decision would be highly inconvenient and open a door to fraud, by leaving the party to his remedy for the loss of the most valuable property, against a common porter. This difficulty, to be sure, would not occur in the case of goods brought by sea from one country to another, and properly landed and warehoused. However, the learned judge did not give any decided opinion upon the general question[c]. Mr. Justice Buller's opinion coincided with that of Mr. Justice Ashhurst. He also argued from the inconvenience of a contrary opinion, as it would produce the necessity of several contracts with the carrier and porter. He said, there was an equal necessity for a third contract with the innkeeper; but in fact there was but one contract, the porter was the servant of the carrier or innkeeper; whom he considered the same, unless the latter were also the carrier's servant. It did not appear to him that the difficulties suggested, respecting foreign ships, existed. When goods are brought here from foreign countries, they are (he observed) brought under a bill of lading, which is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land; and according to the established course of trade, a delivery

[b] 5 T. R. 394, &c. [c] *Id.* 396.

a delivery on the usual wharf is such a delivery as will discharge the carrier. In the principal case however he had no doubt, from the charge paid for cartage[d]. Grose, J. observed, that whether there was a delivery or not might depend on the general custom of the trade, or the particular usage which had prevailed between the parties; and the particular transaction between them in that case was decisive against the defendants. On the general question, the strong inclination of his opinion was the same as that of Ashhurst and Buller, J. on the ground of the possibility of fraud, in delivering the goods to a beggar. The case of foreign goods brought to this country (he said) depends on the custom of the trade, of which the traders themselves are supposed to be cognizant; for, by the general custom, the liability of ship-carriers is at an end when the goods are landed at the usual wharf[e].

Into lighters.

By one of the laws of Wisby it is provided, that when a ship comes within a river or harbour, too much laden to get up, the master may cause the goods to be taken out of the ship, and send them up in lighters or boats[f]. By another of these laws it is declared, that when merchandize is let down into lighters to be carried ashore, if the master question either the ability or honesty of the merchant, he may stop the lighters, and make them stay near the ship till he has paid the whole freight, and cleared all other charges[g]. From this it is evident that by these laws, delivery from the ship into the lighters is not considered

[d] 5 T. R. 396, &c. [e] *Id.* 398, &c. [f] Leg. Wis. 56. [g] *Id.* 57.

dered as an actual delivery to the freighter; for if it were so, it would put an end to the master's lien for his freight. It is also observable, that although it is said that he may detain the lighters till his freight and all other charges be cleared, yet that must always be understood of those charges alone for which the master has a lien on the goods, and not for dead freight, demurrage or the like, for which he has no such lien [h]. Whatever may be the effect of delivery at a wharf, into lighters, or the like, instead of an actual delivery to the freighters their agents or assigns, it is clear that if the goods subsequently come to their hands and are accepted by them that will be sufficient, on the principle of the case of Hotham and the East India Company, before cited [i].

Delivery must be to freighters, or their assigns.

Where the charter-party contains a covenant to deliver the goods to the freighters or their assigns at London, agreeably to bills of lading, the declaration, in an action of covenant on the charter-party for freight and demurrage, is bad, if it do not allege that the goods were delivered according to the terms of the charter-party; it is not sufficient to say that they were delivered at London. It must be averred, and proved, that the delivery was to the freighters or their assigns, according to the contract of affreightment. Where such an action was brought upon a charter-party containing a covenant of that sort, for a voyage to any port or ports in St. Domingo and back to London, it appeared that the vessel had been unjustifiably carried into Jamaica by the Dædalus frigate, under pretence that

[h] Philips v. Rhodie, T. 52 G. 3. K. B. [i] Doug. 277, *ante*, 77.

that part of the cargo was not protected by the licence. The rest was restored to the captain, who procured merchants resident at Jamaica to be bail for the return of it, on his giving them bills of lading of the whole cargo; and the merchants having paid the captors, under a sentence of condemnation, the value of the goods detained and costs, their agents, when the cargo arrived in London, insisted on the freighters repaying the sums advanced, which they accordingly did under protest, in order to get possession of their goods. This was held not a delivery to them according to the charter-party; and consequently the plaintiff could not recover under it, either demurrage for the detention of the ship in Jamaica, or freight for the carriage of the goods from thence to London[k]. As to the claim for demurrage, it was held that none could arise, from the captain of the Dædalus having against law detained the ship, for which he might have been sued in the Court of Admiralty, or the Prize Courts, which sometimes give damages. And although from some cause (which did not appear) the Court of Admiralty had in that case thought fit to give the captors costs, it could not, on that account, be distinguished from any other case in which the detention happened by the wrongful act of others[l]. However, it is presumed that the circumstance of the detention having been by the illegal act of a stranger, would not alone have been sufficient to defeat the claim for demurrage[m]; though the unjustifiable conduct of the master of the ship in disposing of the goods

[k] Johnson v. Greaves, 2 Taun. 355, &c. [l] *Id.* 356, *per* Mansfield, C. J. [m] See Randall v. Lynch, 2 Camp. 352.

goods as he did, and the non-delivery of the goods to the consignees[n], might have the effect of preventing his recovery of the demurrage, as well as the freight. With respect to the latter, it is clear that he could not recover freight on the charter-party, as he had not performed the stipulations of it. To entitle himself to that, it was certainly necessary for him to deliver the goods to the defendants. He did not aver in his declaration that he had so delivered them; and the plea averred that he had not, which was an answer to this claim[o].

Quære, if *assumpsit* will lie, where delivery is not agreeably to bills of lading?

Mr. Justice Lawrence seems to have thought, that the plaintiff might have maintained an action of *assumpsit* for the freight, or for work and labor[p]. But it is presumed that, under the circumstances of the case, it would have been difficult to recover the freight in any form of action; the captain having exceeded his legal authority in disposing of the goods of the consignees as he did, and there being no right and true delivery of the goods to them[q]. It cannot be said, in any sense, that there was such a delivery to the freighters; and although the persons to whom the captain delivered the goods, perhaps from fear, gave them up, it was only upon payment of the sum demanded; and that not till many months had elapsed, during which the freighter by their detention might have sustained great loss, in consequence of the fall of the market or other cause[r]. But what was said in this case as to it's being

[n] See 2 Taun. 358, *per* Mansfield, C. J. [o] *Id.* 359, *per* Lawrence, J. [p] *Id.* [q] *Ante*, 74. [r] *Id.* 538, *per* Mansfield, C. J.

being the captain's duty not to deliver the goods to Taylor and Hughan, the agents of the merchants abroad, without payment of the freight according to the bill of lading, and that it was contrary to his agreement thereby created to do so, has been since over-ruled in the case of Shepard and De Bernales[s]; where it was held by the Court of King's Bench, on former authorities and the reason of the thing, that there is no such duty in the captain by the bill of lading, the clause respecting the payment of freight being for his benefit merely; and that a delivery before the freight is paid, does not preclude a subsequent action for it on the charter-party: this latter proposition indeed, as to the captain's right of action for the freight though he had parted with the goods, was affirmed by Sir James Mansfield in Johnson and Greaves, where he seems to have considered it was maintainable against Taylor and Hughan, though mere agents[t].

All that is necessary to constitute any persons the assigns of the freighters, to whom a delivery of the goods may be made, is that they be in some way authorized or appointed by the freighters to receive the goods. In default of any persons being so appointed or authorized, the goods must be delivered to the freighter himself, or his agents. One question in the case of Shepard and De Bernales[u] was, whether the plaintiff had any right to deliver the goods to the defendant's agent at Cadiz; he being as was contended a stranger to the bill of lading, which was for

Who are such assigns. If none appointed, delivery must be to freighter's agent.

[s] 13 East 565. [t] 2 Taun. 358, 9. [u] 13 East 569.

for delivery to "John de la Piedra, or His Catholic Majesty's Consul at Tangiers, or their assigns." But it was held, that he might be looked upon either as virtually the appointee of John de la Piedra, and in that way he took under the bill of lading *as his assign*; or if not, that John de la Piedra must be considered as having refused to accept the goods, or to make an appointment under the bill of lading, and then, in default of his having appointed any assign, the plaintiff could not do otherwise than deliver to the agent of the defendant himself, the original proprietor[v]. The latter of these resolutions seems to bear some analogy to the case of a bill of exchange; where, if the acceptor do not pay to the person appointed by the bill to receive the money, as payee or indorsee, it is returned to the drawer, as the original creditor of the acceptor.

Delivery of the whole cargo, where a condition precedent.

If the bringing of an entire cargo to the port of delivery be made an express condition precedent by the contract, nothing less than the full performance of it, by bringing the whole cargo there, will entitle the master to his freight; nor does it matter whether the sum made payable by the contract for the carriage of the goods be expressly reserved *eo nomine* as freight, or not; as appears by the following case. The covenant was with the master of a ship, that *if* he would bring his freight to such a port, the merchant would pay him a certain sum; and the declaration averred that part of the goods was taken by pirates, and the residue brought to the port appointed

[v] 13 East 573, 4.

appointed and there unladen; upon which a question arose whether the merchant should pay the money agreed for, since all the goods were not brought to the port of delivery: and the court was of opinion that he was not bound to pay the money, because the agreement of the master was not performed[w]. In this case the word "*if*," constituted an express condition precedent; and no question appears to have arisen as to the master's right to part of the freight, upon a new and implied contract.

However, in cases of freight and passage-money, where a certain sum is covenanted to be paid *per* ton, or *per* man, so that it can easily be ascertained what proportion of the reward agreed for is payable, though the party be not entitled to the whole of it, on account of his not having completely and exactly performed the contract, the court are always willing to consider his partial default in performance not a bar to his whole claim, but only a matter in reduction of it's amount[x]. If the delivery of a complete cargo be a condition precedent to the recovery of any freight, no doubt the defendant is entitled to require the strictest performance of it. But whether it be a condition precedent depends not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract, whether, of two things reciprocally stipulated to be done, the performance of the one does, in sense and reason, depend

Where not.

[w] Bright *v.* Cowper, 1 Brownl. 21, recognized 7 T. R. 385. 8 East 445. [x] Thompson *v.* Noel 1 Lev. 16.

depend upon the other. On this subject, the rule was well laid down by Lord Mansfield in Boone and Eyre[y], that where mutual covenants go to the whole consideration on both sides, they are considered as mutual conditions, the one precedent to the other; but where one of the covenants goes to a part only of the consideration, and a remedy lies on that covenant to recover damages for the breach of it, it is not a condition precedent[z]. The reason is that otherwise, in the latter case, the slightest and most trivial non-performance of the plaintiff's covenant would bar his action for a total failure of the defendant's performance: the plaintiff's covenant is therefore considered apportionable according to the damage sustained by the breach of it, and not a condition precedent to the recovery of any damages by the breach of the defendant's covenants. This doctrine was lately applied to a claim of freight due upon a charter-party of affreightment, where there was a short delivery. In that case, a ship of about 400 tons burthen was freighted to go to St. Petersburgh, and to bring home a complete cargo of hemp and iron, and to deliver the same on being paid freight, at so much *per* ton on each commodity. Lord Ellenborough, C. J. observed, that if the owner were not entitled to freight for any proportion of goods he might bring home short of a complete cargo, and it should appear by any subsequent admeasurement of the vessel, even after the delivery of the goods, that there was wanting the least fraction of a complete cargo;

[y] 1 H. B. 273. 6 T. R. 573. [z] *Per* Lord Ellenborough, Ritchie *v.* Atkinson, 10 East 306.

cargo; if the ship had been supposed to measure 400 tons, and a cargo adapted to that proportion had been loaded, but it turned out that she measured 10 or 20 tons more, the owner would altogether be defeated of his remedy for the whole freight. Would not (said his Lordship) such a construction be contrary to common truth, and the true nature of such a contract? Can any such meaning be fairly inferred from the terms of it? If it be said that a different construction bears hard upon a merchant who has stipulated for the delivery of a complete cargo, it may be answered, that if there has been an imperfect delivery, he will not be ousted of his remedy; for clearly an action on the case lies against the captain, who has made an imperfect, when he could have made a perfect delivery[a].

Receipt of the goods is not material.

In the course of the argument of the case just cited Lord Ellenborough observed, that he did not see how the receipt of the goods changed the situation of the parties; because they were the defendant's own goods, and unless freight were due upon them by the contract, the defendant was entitled to have them, being his own, without any consideration. His taking possession of them was only taking that peaceably, for which, if wrongfully withheld, he might maintain trover. But on the other hand, the plaintiff's argument was a strong one, that that of the defendant would go this length, that if the cargo wanted a single ton only of being a complete cargo,

[a] *Per* Lord Ellenborough, Ritchie *v.* Atkinson, 10 East 308, 9.

cargo, it would be a defence to an action on the charter-party for the freight[b].

Delivery of a complete cargo, *at one time*, is not a condition precedent.

His Lordship indeed intimated, that the covenant on the part of the plaintiff being, that the ship should proceed with all convenient speed to St. Petersburgh and there load a complete cargo, that would not be satisfied by the plaintiff's bringing part of the cargo at one time, and then going back and bringing the remainder of it. But in all the cases of conditions precedent, the thing to be done is entire and indivisible. And the delivery of a cargo of goods is not one entire thing, but in it's nature divisible; therefore, the completion of the cargo is not a condition precedent within those cases[c]. In the case here put, of procuring different parts of the cargo in different voyages, the proper remedy against the master or owner of the ship would be by action on the charter-party for damages, if he have contracted to procure a complete cargo in one voyage; the delivery of such cargo not being a condition precedent.

Nor delivery in like condition, as at time of shipment.

If the bills of lading be in the usual form without any special provisions, and the issue also be general on the fact of a right and true delivery of the cargo according to the bills of lading, that is to be taken in a narrow and restrained sense, and is satisfied by the delivery of the number of chests or packages shipped on board the vessel. If the contents of any of

[b] *Per* Lord Ellenborough, Ritchie *v.* Atkinson, 10 East 301. *Sed vide* Hotham *v.* E. I. C. Doug. 377. [c] 10 East 301. 303. 305.

of them turn out to have been damaged by the negligent stowing, or subsequent want of care by the master or crew, or proper ventilation, the freighter has a cross action to recover damages; but it is no answer to an action on the charter-party for the freight[d]. If the like good condition of a cargo when delivered as when shipped, were a condition precedent to the right to recover freight, and the goods were damaged to the extent only of a farthing, the master would not be entitled to recover any freight; which never could be the intention of the contracting parties[e]. However, if there is a special provision in the bills of lading for the care, or against the negligence of the master and crew, and the defendant by his plea admits that all the goods were delivered, but says that the plaintiff did not make a right and true delivery of the whole cargo agreeably to the bills of lading, an issue on such plea might let the defendant into proof of negligence[f].

Consequences of incomplete or insecure delivery.

Where the covenant in the charter-party is for the right and true delivery of the goods agreeably to the bills of lading, the party to the contract of affreightment is liable to an action for damages, in case of an incomplete or insecure delivery. Malyne[g] observes, that when coffers, packs, pipes or other commodities, are delivered close packed or sealed, and afterwards received open or loose, the master shall be charged for it,

[d] Davidson *v.* Gwynne, 12 East 381. [e] *Id.* 394, 5, *per* Bayley, J. [f] *Per* Lord Ellenborough, C. J. *Id.* 393. [g] Mal. 102.

it, until due trial and consideration thereof be had: and that he must answer for the harm which rats do to the goods in the ship for want of a cat[h]. As to the damage for which the master shall be liable, it is also provided by the laws of Oleron and Wisby, that if the master and mariners do not trim the sails as they ought, and it happens that ill weather overtakes them at sea, and the main-yard shakes or breaks one of the pipes or hogsheads, the ship being arrived at her port of discharge, the master and four, six, or such of his mariners as the merchants shall require, must make oath that the wine was not lost by them, nor their default, as the merchants charge them; and then the master and his mariners shall be acquitted thereof: but if they refuse to make oath to that effect, they shall be compelled to make satisfaction for the damage, for they ought to have ordered their sails aright before they departed from the port where they took in the lading[i]. So, if it be alledged by the merchant that in consequence of the ship being ill laden and improperly governed, the wine is lost, the master shall be liable to make up the loss, unless the mariners declare the contrary upon oath, in which case the loss shall be the merchant's[j]. Again it is declared, that if from mooring the ship insufficiently or improperly upon her coming into harbour, the goods become spoiled or damaged, the master must make it good to the merchant[k]. Although such great importance is, by the above laws, attached to the protest of the master and his mariners, it certainly cannot in this or any other

[h] Mal, 98. See also 1 Wils. 281. [i] Leg. Ol. 11. [j] Leg. Wis. 23.
[k] *Id.* 36.

other instance do away or alter the effect of any of the provisions in an express contract of affreightment.

Construction of East India Company's charter-parties, in such cases.

Charter-parties, like all other mercantile contracts, ought to receive a liberal interpretation; and when some of the clauses, from being introduced and altered at different times, are ambiguous and apparently contradictory, the court will endeavour to find out the meaning of the parties. In the construction of them there is no difference between a court of law and a court of equity[l]; though equity may sometimes afford relief where it is not to be obtained at law[m]. The province of construing written documents belongs to the court; but where a doubt arises about the intention and received understanding of mercantile instruments, the construction of them is sometimes left to the jury, with such observations as the judge may think proper to make respecting it. Where a question arises upon a charter-party as to who shall bear a loss, that must be determined by the intention of the parties, as it is to be collected from their own expressions, and the nature of the contract itself; and where the jury, to whom a question of this sort is left, has determined it according to the justice and reason of the case, the court will not disturb the verdict[n]. A charter-party, entered into by the East India Company, amongst other clauses, contained one that if any of the homeward cargo should be *lost*, or not delivered into the Company's warehouses on the ship's arrival in England, (except in the case of an utter and inevitable loss of ship and cargo,) the owners of the vessel should pay and allow to the Company the prime cost of such goods,

[l] *Per* Lord Mansfield, Hotham *v.* E. I. C. Doug. 277. [m] Edwin *v.* E. I. C. 2 Vern. 210. [n] Hotham *v.* E. I. C. Doug. 277.

goods, and £30 per cent. thereon. Another clause in the charter-party provided, that if any of the homeward goods when delivered should be wet or *damaged*, the ship-owners should take them at the invoice price. But by a third clause they were not to be charged with any damage, except such as should appear to be *sea-damage*. The ship in her return home, met with a storm and was stranded, whereby part of her cargo consisting of saltpetre was lost, and the principal part of what remained was damaged; but that was got out of the ship and sent to London, where the vessel was afterwards brought, with a small part of the cargo still remaining on board. The defendants contended, that if they were liable to freight at all under these circumstances, they were, by the above clauses in the charter-party, entitled to a deduction in respect of the goods lost, as well as those which were damaged, and the expences of bringing home the latter and rendering them marketable. These points came on to be tried on different feigned issues; and the jury found that the plaintiffs were not liable to pay for the goods lost, or damaged; but that they were liable to the defendants for their proportion of saving the goods, by way of general average; as well as the expence of bringing them to London. And the Court of King's Bench, upon argument, held this verdict right, upon all the issues[*].

Charter-party, how far a contract of insurance.

Lord Mansfield, in delivering his judgment in this case, observed, that the charter-party was a contract of affreightment, and it was not in contemplation of the parties that it should operate as an insurance against the perils of the sea. The Company (he said) stood their

[*] Hotham *v.* E. I. C. Doug. 277.

their own insurers. The fair construction of the contract therefore was, that the ship-owners should be answerable for damage occasioned by their own fault, or that of their servants, as, from defects in the ship, or improper stowage, such as mixing commodities together which might damage one another. If they were liable for damages occasioned by storms, they would be insurers, not freighters. As to the distinction between the goods lost and damaged, his Lordship said, that the clause respecting ship-damage extended to all the former clauses of the charter-party; the whole of which was one entire contract, and must be understood in a manner consistent with itself. It never could be intended, that the owners should be protected from the lesser loss, but remain answerable for the greater[p]. The other two Judges in court, Ashhurst and Buller, J. appear, without hesitation, to have concurred in opinion with Lord Mansfield[q]. However, as it cannot be disputed, but that every man is bound to the performance of his own express contract, if not illegal, however hard or unreasonable it may appear[r], it is clear that a charter-party may be so framed as to operate as a contract of insurance, as well as of affreightment; as it would in a great measure, in all cases, if it were not for the introduction of the usual exceptions[s]. But the court will not, unless the express language of the contract unequivocally require it, give effect to so harsh a construction; much less will they disturb the verdict of a jury which is consistent with the nature of the contract, and the justice and reason of the case.

[p] Hotham v. E. I. C. Doug. 278. [q] *Id.* [r] *Ante*, 70. [s] *Post*, chap. 5.

CHAPTER V.

OF THE EXCEPTIONS IN THE CHARTER-PARTY.

Necessity of exceptions.

THE necessity of special exceptions from all cases of extraordinary peril is too apparent to require further observation or comment[a]. Formerly carriers were allowed to protect themselves by special acceptances in such cases only; but in modern times they have been permitted to narrow and limit their general responsibility to almost any extent in all cases. The policy of permitting them to do so is a matter of great question. But it cannot be doubted that merchants may enter into any particular stipulations they think proper or convenient in their contracts; and as their responsibility and risk is great, they should be cautious that by general words in their charter-parties, they do not subject themselves to damages for accidents they cannot answer for, unless they intend to become insurers. The only means of preventing this is, by inserting exceptions in their contracts against liability for any losses or accidents which it is out of their power to foresee or guard against. It is hardly necessary to observe, that particular stipulations are peculiarly

[a] Ante, 97.

peculiarly prudent in the case of perishable goods; for although the master or owners may not be liable for inevitable damage to such goods, yet without a particular agreement it may be incumbent upon them to defend themselves against a charge for such damage, which they may be wholly unprepared to answer or account for. Formerly one way of freighting was, that the merchant agreed with the master for a sum certain, to convey his goods insured against all peril, in which case he was responsible if any detriment or loss happened; but that is now become obsolete[b].

Exception of restraints of princes, &c. applicable to masters or owners only.

Although a man undertake what he cannot perform, he shall answer for his non-performance, unless protected by special exception in the contract; and the exception of the restraints of rulers and princes in a charter-party of affreightment has been held to be only applicable to the master or owners, and not to excuse the shippers[c]. The case alluded to was that of an action upon a memorandum for charter, by which it was stipulated on the part of the owners, that the ship should sail to Liebau, and there load from the factors of the defendant a full cargo of barley and proceed therewith to Berwick, and deliver the same on being paid freight at the rate of 8*s*. 6*d*. *per* quarter, with two thirds port-charges and pilotage, (restraints of princes and rulers excepted,) one half of the freight to be paid on right delivery of the cargo, and the remainder in two months following; and the ship was to be allowed to remain on demurrage ten days over and above her running or lay days, at £3 *per diem*. On her arrival in Liebau Roads the captain was

[b] Mol. b. 2. c. 4. s. 2. [c] Blight *v.* Page, 3 B. & P. 295.

was informed by the factors of the defendant, that the Russian government had prohibited the exportation of barley, and that it was therefore out of their power to furnish the intended cargo; the captain however entered the port, and after continuing there forty-nine days returned in ballast to Berwick. The action was brought to recover £459 for freight, £27. 18s. for charges, and £30 for ten days demurrage. It was argued for the defendant, that the exception of the restraints of princes and rulers was applicable both to owners and shippers; but Lord Kenyon, C. J. was decidedly against the defendant on this point, upon the above general principle of law, and therefore held that the plaintiff was entitled to recover the freight and charges: but with respect to the demurrage he held, that as it appeared that notice was given before the captain entered the port that the factor could not furnish a cargo, there was no pretence for making the plaintiff liable to that charge[d].

ecessary to otect them, case of ıbargo.

It is no defence to an action for not carrying the plaintiff's goods a certain voyage, that in the course of the voyage an embargo was laid on the ship till further order of council, which lasted for two years and more; as such embargo only suspends and does not dissolve the contract, so that the defendant is bound to proceed on the voyage after the embargo is taken off, unless there be an exception in the contract to excuse him from so doing[e]. But the usual exception in the charter-party and bill of lading against the restraint of princes

[d] Blight v. Page, 3 B. & P. 295, recognized in Touteng v. Hubbard, 3 B. & P. 298. [e] Hadley v. Clarke, 8 T. R. 259, recognized in Touteng v. Hubbard, 3 B. & P. 298.

princes and rulers will have that effect. In the case cited, the plaintiff declared on a contract to carry his goods from Liverpool to Leghorn, *the dangers of the seas only excepted,* and stated that the ship, after arriving at Falmouth, abandoned the voyage and returned with the goods to Liverpool, whereby the plaintiff not only lost the benefit of having his goods carried to Leghorn, but also of certain insurances he had effected on them for the voyage. The facts of the case appeared to be, that the vessel arrived at Falmouth the 30th of June 1796, and during her stay there waiting for convoy, an embargo was laid on all ships bound to Leghorn by an order in council of the 27th of July in that year, which embargo was directed to continue until further order: the ship was thereby prevented from proceeding on her voyage. By another order in council of the 23d of August, 1796, the embargo was taken off, so far as to permit vessels to proceed to the ports where they had taken their cargoes on board, and there re-land and warehouse the same, provided the master gave security that they should return to such ports under convoy. On the 7th of May, 1798, the plaintiff received notice from the defendants, that unless they would receive the goods back, pay the freight, and deliver up the bills of lading, or give a bond of indemnity, they would re-land and warehouse the goods. In June following he received a further notice from them of their intention to bring the cargo back to Liverpool, and re-land and warehouse the same there, agreeably to the second order in council, unless the plaintiff chose them to be landed at Falmouth. The ship remained at Falmouth till the middle of August, 1798, during all which time the embargo continued, when the defendants, without the

 plaintiff's

plaintiff's consent, set sail with his goods to Liverpool under the protection of the last-mentioned order in council. On the ship's arrival at Liverpool, the plaintiff received his goods back, but without prejudice to his right of action. On the 24th of October, 1798, nearly two months afterwards, the embargo was wholly taken off by another order in council. Lord Kenyon, C. J. in giving his opinion on the case observed, that both parties were innocent, but one of them must suffer; that no line had been, or he believed could be drawn, between an embargo for a longer or shorter period of time. It was admitted that an embargo being imposed during the war was a legal interruption of the voyage, and it would be attended with the most mischievous consequences if a temporary embargo were to put an end to the contract; for it would have the same effect as to all contracts for freight and wages. If the contract was dissolved, when did the dissolution take place? during the ship's stay at Falmouth, or on her sailing for Liverpool? The defendants' keeping the plaintiff's goods all the time under the contract, afforded an argument against them. However his Lordship's opinion did not proceed on that ground, but on the general principle that a temporary interruption of the voyage by an embargo did not put an end to the contract, any more than if the ship had been driven out of her course by stress of weather, which was never pretended to dissolve the contract or determine the voyage[f]. Grose, J. assented to the defendants' argument, that the contract was for the conveyance of the goods in a reasonable time; but then he thought they were bound to complete the execution

[f] Hadley v. Clarke, 8 T. R. 265.

execution of it as soon as they reasonably could after the embargo was taken off: he said, an act of parliament would not dissolve but only suspend the execution of the contract, and an embargo could not have a greater effect[g]. Lawrence, J. observed, that the defendants had absolutely engaged to carry the goods to Leghorn, the dangers of the seas only excepted; that therefore was the only excuse they could make for not performing their agreement. If they had intended to make any other exception from their obligation, they should have introduced it into the contract[h]; the distinction being where the law creates the duty, and where the party brings it upon himself by his own contract, in the latter case he is not excused even by inevitable accident, because he might have introduced an exception against it in his contract[i].

Where it does not extend to British embargo.

The usual restraint of princes and rulers does not extend to an embargo by the British government, occasioned by the hostilities of a foreign state, so as to entitle a subject of such state to proceed on the voyage after the embargo is taken off, and recover freight, if the object of the voyage be previously lost by the delay occasioned by the embargo; though it may be otherwise, if the embargo be in consequence of the hostilities of a third state, or the claim be made by a British subject[j]. The case cited was that of an action by the owners of a Swedish ship against a British merchant, for not employing the ship pursuant to agreement; whereby it was stipulated, that she should proceed with all convenient speed to the island of St. Michael's

[g] Hadley v. Clarke, 8 T. R. 266. [h] *Id.* 267. [i] Paradine v. Jane, Al. 27. [j] Touteng v. Hubbard, 3 B. & P. 291.

Michael's for a cargo of fruit, and return therewith to the port of London *(restraint of princes and rulers, during the voyage, always excepted)*. On the 22d of December, 1800, the vessel sailed from London, but was driven back by contrary winds; and on the 15th of January, 1801, she was stopped in Ramsgate harbour, by an embargo from the government of this country upon all Swedish vessels; by which she was detained till the 19th of June following, when the season for shipping fruit at St. Michael's was over. On the 2d of July, 1801, (being as soon as possible after the embargo was taken off,) the captain was ready to proceed on the voyage, and so informed the defendant; but he replied that the ship could not be loaded at St. Michael's, the season for shipping fruit there being passed. The actual damage the plaintiffs sustained by the sailing on the voyage till the ship was driven back, by paying the sailors during the embargo, &c. amounted to £397. *6s. 6d.* for which they obtained a verdict, subject to the opinion of the court on a case stating the above facts. Lord Alvanley, C. J. in delivering the opinion of the court, said, that the defendant having expressly dispensed with the plaintiffs' proceeding to St. Michael's for the cargo, as soon as the embargo was at an end, no objection could arise on the ground of his not having completed the voyage[k]. It appeared to him also, that the exception in the charter-party was introduced for the benefit of the master, not of the merchant[l]. If then it had not been the case of a Swedish ship hired by an English merchant, the merchant would have been under the necessity of furnishing

[k] *Ante*, 77. [l] *Ante*, 99.

furnishing the vessel with a cargo, if she had arrived at St. Michael's as soon as she conveniently might after the embargo was taken off, although by arriving after the fruit season was over the object of the voyage might be defeated[m]. But the ground on which the court decided the case before them was, that a British merchant is not liable to answer for any damages which the owner of a foreign vessel might sustain, from an embargo laid by the British government on foreign ships, in the nature of reprisals and partial hostility. By the embargo in question all Swedish vessels were detained, and the crews made prisoners; which embargo every good British subject must consider as an act justified by the conduct of Sweden towards this country. If such an embargo had been laid on by a third prince, the court gave no opinion whether it would have defeated or merely suspended the contract, as the loss of the voyage would not in that case have been imputable to the act of the Swedish captain or his government; nor did they give any opinion on the question supposing it to have arisen between two British subjects, as the policy of the state was not concerned in preventing an insurance in such case. But the impossibility having arisen from an act of the British state, by which all His Majesty's subjects were bound, occasioned by an act of the Swedish court, to which all the subjects of Sweden were parties, and the policy of this state being not to indemnify foreign subjects against reprisals made necessary by the hostile acts of their own government, it was against all legal principle and public policy, to support a claim by those subjects to such indemnity[n]. Judgment of non-suit was therefore ordered.

A capture

[m] *Ante*, 100. [n] Touteng *v.* Hubbard, 3 B. & P. 298, &.

Exception of perils of the seas extends to loss by pirates.

A capture by pirates has been held to be within the exception of the perils of the seas. An action was brought upon a charter-party, containing that exception, for not performing the voyage; the defendant pleaded that the ship was taken *upon* the sea by certain warlike persons unknown, whereby he was prevented from completing the voyage. Rolle, J. said, that it was not good pleading to allege the capture by persons unknown; and Bacon, J. seemed to think, that the plea should have alleged that the ship was carried into unknown places; but upon the principal question, it was held that perils *upon* the sea were as much dangers *of* the sea, as those by shipwreck or tempest[a]. The proper form of pleading in such case is, either to state that the ship was taken on the high seas by pirates, or that it was lost by the perils of the seas generally.

Running foul by accident. *Aliter*, by negligence.

If the owners of the ship, or the captain, be guilty of any degree of negligence, or want of care by which the accident could have been prevented, they will certainly be liable, notwithstanding the usual exception against sea-perils; but they are exempt by this exception in the charter-party and bills of lading, from misfortunes happening during the voyage which human prudence could not guard against, and without fault in either party. An action was brought against the owners of a ship called the Atlas, on a charter-party of affreightment, for the loss of the goods: the bills of lading were in the usual form, with an exception of the perils of the sea. It appeared in evidence that two other ships, the Patriot and the Matthew, were sailing in one

[a] Pickering *v.* Barkeley, Sty. 132. 2 Rol. Abr. 248. S. C.

one direction, and the Atlas in another: the Matthew was to leeward when they saw the Atlas coming, and steered closer to the wind to give the Atlas an opportunity to pass; but the Atlas mistook the object, and unable to weather both ships, she and the Patriot run foul of each other, and the Atlas went down. The question was, whether the defendants were protected by the exception in the charter-party against sea peril; and it was contended on the part of the plaintiff, that the Matthew having endeavoured to keep out of the way of the Atlas, the accident happened from the negligence of the crew of the latter ship, and so could not be deemed a peril of the sea. But Lord Kenyon was of opinion that neither ship could be deemed in fault, and that the misfortune was within the exception in the charter-party. The jury (which was a special one), being about to find for the defendants, the plaintiffs consented to be nonsuited[p].

Against embezzlement or barretry of master, &c.

Without a particular exception in the charter-party, as the owners would be bound for the performance of its stipulations in all events, though out of their power to avoid, they would also be liable for all the acts of the master and mariners, against which no human caution or foresight could guard, as, in the case of embezzlement, barratry, or the like; it therefore behoves them, when they are parties to the contract of affreightment, to have a clause introduced to prevent their liability to answer for the embezzlement or barratry of the master or mariners. Indeed, their responsibility in these or the like cases may be guarded against

p Buller v. Fisher, 3 Esp. 67.

against by the mere enumeration of them, in addition to the other perils contained in the usual exception. Where the master is party to the contract, it would be equally proper for him to extend the exception to the embezzlement, &c. of the mariners. What amounts to barratry is already determined by cases on insurance law[q], to be found in the excellent treatises of Mr. Serjeant Marshall and Mr. Park, on that subject.

[q] See Knight *v.* Cambridge, 2 Lord Raym. 1349. 1 Str. 581. S. C. Stannett *v.* Brown, 2 Str. 1173. Earle *v.* Rowcroft, 8 East 126. 135.

CHAPTER

CHAPTER VI.



OF THE FREIGHTER'S COVENANT TO PROCURE A LICENCE, AND FURNISH A CARGO; AND HEREIN OF DEAD FREIGHT.

IT has already been considered how far it is the master's duty to procure the necessary licences and clearances for the voyage, in the absence of any express stipulation or covenant for the purpose in the contract of affreightment[a]. In this chapter the proposed subjects of enquiry are, first, the construction of express covenants to procure licences: secondly, the obligation of the freighter to furnish a cargo; where the offer of one, under particular circumstances, will not be a performance of this obligation; the effect of his shipping a partial cargo, and unloading the goods once shipped: and thirdly, the nature of dead freight; what sum is payable on that account, and subject to what deductions, where there is a failure on the part of the freighter to ship such a cargo as is required. Division of chapter.

Where

[a] *Ante*, 34.

Construction of covenant to procure licence, in general.

Where the charter-party is not to go to any particular port, but generally to proceed to any port or ports in a particular island or sea, without any distinction of such ports as are in a state of hostility to this country or not, the true construction of a covenant in such a charter-party to procure a licence for the ship (though it be not said a sufficient licence) is, that the licence shall be sufficient for such port or ports as the ship shall go to, and shall require a licence. To such ports as are friendly or neutral a licence is not necessary, as it is to those which are hostile; therefore if the master procure a licence for the latter, for which only it is necessary to procure it, and then go to such ports as are friendly or neutral, in which case no licence is required, it cannot be said that the ship had not a sufficient licence: for the case has not occurred in which any licence at all was required. The covenant to procure a licence cannot be broken where none is ultimately necessary[b]. The purpose of the licence is only to protect the ship, and it is only necessary if she goes to an hostile port. If she have no licence, or have such a one as would not suffice for an hostile port, yet if she do not go to such port, it can only be said that she has no licence, or no sufficient licence, where none was necessary[c]. Therefore no action can be maintained as for a breach of the covenant to procure one.

Licence to permit the grantees, or their agents, or the bearers of their bills of lading, to export goods.

Where merchants in London obtain a general licence to permit them, *or their agents, or the bearers of their bills of lading*, to import goods specified in such bills,

[b] Johnson v. Greaves, 2 Taun. 355, &c. *per* Mansfield, C. J. [c] *Id.* 359, *per* Lawrence, J.

bills, provided the same be shipped for certain ports specified in the licence, with the usual clause, that it shall be incumbent upon the persons using or claiming the benefit of the licence to prove a compliance with its conditions; such licence is not confined to goods shipped by the London merchants on their own account, but extends to goods shipped by their correspondents abroad under a bill of lading of those particular goods, indorsed in blank, and transmitted with the invoice to a person for whom they were purchased by such correspondents, at the recommendation of the London merchants; if another and general bill of lading of the whole cargo be afterwards signed by the captain, and specially indorsed to them, to whom the captain is addressed, with directions to follow their orders. In the case alluded to, such a licence was obtained by Bridge and Smith, London merchants, on the 21st of February, 1801. On the 20th of February the plaintiff, having been recommended to their correspondents at Rotterdam, directed them to purchase goods, which they accordingly purchased, insured, and shipped for him; and the captain signed the usual bills of lading for delivery of these particular goods to the shippers or their order, one of which they indorsed in blank, and inclosed with the invoice and a letter of advice to the plaintiff. On the 24th of April a general bill of lading for the whole cargo of the ship was signed by the captain, and specially indorsed by Smith and Son to Bridge and Smith, to whom the captain was addressed, with directions to follow their orders; and the bills of exchange were remitted to them to get accepted by the plaintiff, that in case of their dishonour by him, Bridge and Smith might stop the goods under the general bill of lading.

Lord

Lord Alvanley, C. J. was of opinion that it was the intention of government to authorize this sort of importation: he said they intended that any goods coming to this country under Bridge and Smith's bill of lading, and with their permission, should be protected by the licence; and it was within the knowledge of government this use was made of such licences: the words of the licence were general, and if the contrary had been the intention it would have been expressed. With this general bill of lading on board, no custom-house officer would have dared to stop the goods. The court will not construe the acts of government strictly against the merchants. A fair use had been made of the licence, the terms of which warranted the transaction[d].

Where it is to export goods, *being the property* of the grantees.

But it is otherwise if the licence be expressly granted for the exportation of goods, as being the property of the persons to whom it is granted. The licence permitted T. Baker and Sons to import on board six ships, not named, from certain ports, such goods, *being the property of the said T. Baker and Sons*, as might be specified in their bills of lading, with the usual clause as to the proof of the licence; and in the margin was written "T. Baker and Sons' licence to import." Baker, who was the ship's broker, proved that licences for all persons on whose behalf he acted were constantly taken out in his own name in the same form; that he appropriated the ship in question as one of the six for which the licence had been obtained, and the plaintiff repaid him a proportion of the expence of it. It does not

[d] Deffis v. Parry, 3 B. & P. 4, 5.

not appear how the bills of lading were drawn or indorsed; but the question was if the transaction was legalized. Mansfield, C. J. said, he had no doubt of the honesty of the transaction, the truth of the broker's testimony, the innocence of the plaintiff, or the prevalence of the practice: but a lawyer or man of business, looking at the licence, would say it was nothing else than a licence to Baker[e]. Heath, J. observed, that the course at the secretary of state's office had been altered since 1802, before which time the terms of the licences granted were very general, though they are now much confined; whence it appears that some inconvenience had been found in the former practice. Chambre, J. said, the licence was most explicit notice to those who obtained it, that their conformity lay upon them in every respect; after which they could not profess ignorance. And the rule to set aside the nonsuit was discharged. But on a subsequent day Mr. Serjeant Shepherd moved for a new trial, upon an affidavit of Baker the broker, which suggested that he had, according to the usual practice of trade, himself received a general bill of lading, comprehending the goods in question, which he had mislaid, and that he did not doubt of obtaining a duplicate from Amsterdam. The court seeing that it was merely a question for costs, and being informed that other actions were depending upon the same question, in which the fact of the bill of lading would appear, directed the judgment to be stayed till those causes should be determined, the plaintiff undertaking to try them

[e] The report says nothing less than a licence to *Feize*, but that seems a mistake.

them as soon as he should obtain the general bill of lading. The rule was accordingly enlarged[f].

Licence, to export articles of war; where necessary, and where presumed.

In the case of Van Omeron and Dowick, which was an action against the owners of a ship on the bill of lading, for a wrongful sale of the goods by the captain, an objection was taken, that the goods (which were cutlasses) were contraband articles of war, the exportation of which was prohibited, without a licence from the king; and that no such licence was produced. But Lord Ellenborough said, if it were proved that the cutlasses were entered at the custom-house, he would presume *omnia ritè acta.* No evidence of this sort could be found; but it turned out that by the stat. 33 *Geo.* 3. c. 2. the king was only authorized to prohibit the exportation of implements of war by proclamation; and the defendant not being prepared with the gazette containing the proclamation for this purpose, the plaintiff had a verdict[g].

To bring home a *return cargo,* construction thereof.

One question which accidentally arose in the case of Johnson and Greaves[h] was, whether a cargo being purchased in part only, or not at all, with the proceeds of the outward cargo, is within a licence to bring back a *return cargo?* The issue was intended to try that question; but the case did not ultimately turn upon it, although there was much argument on the meaning of a cargo of this sort. Mansfield, C. J. seems to have been inclined to think that such a cargo necessarily implied goods purchased with the proceeds of the outward cargo; for (said he) " to be sure, the words mean nothing

[f] Feize *v.* Thompson, 1 Taun. 125. [g] Van Omeron *v.* Dowick, 2 Camp. 44. [h] 2 Taun. 344.

nothing if they cover any cargo, not being one bought with the produce of the goods sent out from this country:" but it was not (as he observed) then necessary to decide that question. The licence recited that the defendants were desirous of obtaining the royal licence and protection for the British ship Ben Lemond, W. Barr master, (which they intended to load at Portsmouth with a cargo of British manufactures and East India produce, to convey and export the same to the island of St. Domingo), and the importation *(in return* for the cargo so to be exported) of specie, bullion, coffee, &c. or any other articles, the growth or produce of the said island; and contained the following direction, that the property of the defendant Greaves and other British merchants, so to be exported (to any ports or places in St. Domingo, which should not be under the immediate dominion of any of his majesty's enemies), and also the *returns* of the said cargo, (consisting of articles of the growth and produce of the said island, except copper, to be brought back in the same ship direct to some port of the United Kingdom), should not be liable to condemnation as prize: and that if the said property should be seized or detained, either on the outward or homeward-bound voyage, as prize to any of his majesty's ships of war or privateers, and brought to adjudication in any of the courts of admiralty or vice-admiralty, it should be forthwith released upon a claim being exhibited, and sufficient bail being given to answer the adjudication; but that it should lie upon the defendant, or his agents, to make due proof of the circumstances therein stated, and that every thing was had and done according to the true intent and meaning of the licence. The vessel having received on board at

 Portsmouth

Portsmouth a cargo, chiefly of coffee-bagging of no great value, sailed to Cape François, which was then under the dominion of Christophe; on her arrival, the master received from the defendants' agents their instructions to proceed to Gonaives, another port in the island, under the same dominion, where he discharged his outward cargo, and received on board another, consisting of coffee and cotton the produce of the island, in separate parcels[i]. On the 29th of March, 1808, the ship sailed from Gonaives on her homeward voyage, and on the 30th she was detained by the Dædalus frigate, Captain Warren, who conceiving, on inspection of the papers, that the greater part of the cargo on board had not been shipped in return for the outward cargo, within the scope of the licence, sent the ship and crew into Kingston in Jamaica. Upon her arrival there on the 11th of April following, he restored to the master seventy-three bags of coffee consigned to the defendants, which appeared to be purchased with the produce of goods directly exported from London, and libelled the remainder of the cargo as prize in the court of vice-admiralty at Jamaica[j], which condemned it as enemy's property. But the ports of Cape François and Gonaives not being at the time of this adventure, in the power of the enemies of Great Britain, upon appeal brought in England, the sentence of the vice-admiralty court in Jamaica was reversed, upon payment by the owners of the captor's costs[k].

Beawes

[i] 2 Taun. 347, 8. [j] *Id.* 348. [k] *Id.* 350.

Beawes thus accurately describes the nature of dead freight. If (says he) a ship be freighted to go to any place to load, and on arrival there the factor cannot or will not put any thing on board her, after the master has staid the days agreed on by the charter-party, and made his regular protests, he shall be paid, empty or full[1]. If no cargo be loaded, the compensation payable to the owner or captain on this account is called dead freight, in opposition to freight due for the carriage of goods loaded on board the ship. The former is, therefore, rather a compensation in lieu of freight, than freight itself. It is, indeed, a particular name given for such damages as are recoverable by the captain or owner of the ship against the freighter or merchant, for the loss of the freight which would otherwise have become payable by the charter-party, in consequence of his not putting it in the power of the captain or owner to earn such freight, by not loading a cargo according to the terms of his contract. These damages are in general quite unliquidated, and to be ascertained by a jury or an arbitrator; but sometimes, a particular sum is stipulated in the charter-party to be paid by the merchant or freighter, in case of his not thinking fit or being unable to load a cargo; in which case the sum so stipulated is also called dead freight.

Dead freight, what, how contracted, and the causes thereof.

If the captain sign bills of lading for a less freight than is stipulated for by the charter-party, he will be bound to deliver the goods on being paid at the rate mentioned in the bills of lading; but otherwise he is entitled to a lien on the cargo, as well as the security of the charter-party,

Offer of cargo, at less freight than in charter-party, same as no offer.

[1] Beawes, 136. 139.

ter-party, for the full amount of the freight thereby stipulated. The shipper's agent has no right to annex any condition to the offer of a cargo, as, that the captain shall sign bills of lading at a lower rate than that mentioned in the charter-party; and if he do annex such a condition, it is a breach of the covenant to load a complete cargo, as much as if no cargo at all had been offered by the freighter. In an action on a charter-party for a voyage to Jamaica and back, whereby the defendant covenanted to load on board the ship at Jamaica a full cargo of sugar, and pay freight for the same at the rate of 10*s.* 6*d.* *per* cwt.; the defendant's agent tendered the captain a cargo of sugar, but insisted upon his signing bills of lading for it at the rate of 10*s.* *per* cwt.; the captain refused to take it on board on those terms, and the question was, whether the defendant was liable for dead freight? The attorney-general insisted that the captain was bound to take the cargo on the terms proposed, inasmuch as no prejudice could have arisen from this to the plaintiff, who might still have sued on the charter-party for the full freight. But Lord Ellenborough held otherwise, for the reasons above stated, and the plaintiff had a verdict[m].

So, the offer of a cargo without a permit, if it could not be taken on board without one, is not sufficient.

So, an action may be maintained against the freighter upon a charter-party for not loading a cargo, though it appears that he actually offered to load one on board the vessel at the freight contracted for, which was not accepted by the master on account of a foreign embargo law, and the refusal of the custom-house officers to grant a permit. For it seems to be the freighter's

[m] Hyde *v.* Wallis, 3 Camp. 202.

freighter's duty, in such case, to procure a proper permit for loading the goods, without which the vessel as well as the cargo might have been confiscated, if the latter had been taken on board whilst the embargo continued; and the exception against the restraint of princes, &c. is only applicable to protect the captain or owners of the vessel, and not the shippers or freighters. In the case alluded to, the defendant covenanted to procure a loading and send it alongside the ship, in the usual form. The defendant's counsel put in a paper signed by the plaintiff (the captain, who had entered into the charter-party), to the following effect: "I do acknowledge that the agents of Luscomb and Son (the freighters) offered the cargo, and the sole reason why the same has not been taken on board is, the refusal of the custom-house officers to grant a permit to take the goods on board, which is still continued." This refusal was understood to have been on account of the American embargo law; notwithstanding which, the jury found a verdict for the plaintiff. A rule to shew cause why there should not be a new trial was granted, on a suspicion that it was an artificial letter; but that being a question for the jury, who had decided the letter to be genuine, that question fell to the ground, and the rule was discharged[u].

Or, if the goods were not sent alongside the vessel, &c.

If the fact of sending the goods alongside the vessel, or the discharge by the plaintiff from sending them alongside, be put in issue by the pleadings, the proof must sustain the terms of the issue, in order to entitle the defendant to a verdict. In the case of Sjords and Luscomb,

[u] Sjords v. Luscomb, E. 32 G. 3. K. B.

Luscomb, just cited, when the rule for a new trial came on to be argued, Lord Ellenborough said, that the discharge was not put in issue, but only the sending of the goods alongside; and the embargo could not prevent the plaintiff from recovering, on the authority of Blight and Page, which was recognized by his lordship and the court. It appeared that the defendant was willing to put, and the plaintiff to receive on board a cargo, except for the embargo. The only difficulty arose from the narrowness of the issue joined. If the discharge had been in issue, the plaintiff would have been entitled to recover; for there was no discharge. However, the paper relied upon in evidence did not say that the cargo was sent alongside; so that it did not sustain the terms of the issue. The rule was therefore, on that ground, discharged[o].

Shipment of part of cargo only.

According to Molloy, if part of the lading be on board, but by misfortune the merchant have not his full lading by the stipulated time, the master is at liberty to contract with another merchant, and shall have damages for the time that the goods were aboard after the time limited; for the agreement to load being in the nature of a condition precedent, a failure in performance will determine the contract, unless afterwards affirmed by consent. And though it be not prudent for the master to depart from the contract, in every case where it happens that the agreement as to the lading is not strictly performed, and it is seldom or ever done if any part of the cargo be aboard; yet it is of the highest importance that masters of

[o] S. C. M. 53 G. 3.

of ships should be free, for otherwise by the lading of a single cask or bale, the voyage might be defeated. On the other hand, if the vessel will not hold all the merchandize, the merchant may discharge the master, and ship aboard another vessel the remainder of his goods, and recover damages against the master or owner; upon the like reason as the former rule[p].

Where the goods are unloaded by the merchant.

If the cargo be fully laden, and the ship has broken ground, but the merchant resolves to unlade the goods, it is said that by the law marine freight is due[q]. This must be taken to mean dead freight; and by the common law it is quite clear, that in such case an action lies for preventing the ship-owner from recovering his freight, according to the contract between the parties. But he cannot sue or declare for freight *eo nomine;* as that is only due in case the contract is carried into execution, by the conveyance and delivery of the goods. A special count should therefore be framed in such case, according to the circumstances.

Sum stipulated payable, whether ship returns in ballast, or not.

If a certain sum be stipulated for dead freight in default of shipping a return cargo, in that event the sum stipulated is payable whether the ship returns in ballast or not. In the case of Bell and Puller, it was observed by Mansfield, J. C. in the course of the argument, that the stipulation for the payment of the £2700, in case circumstances should prevent the shipping a return cargo, would include the case of returning in ballast[r]. If it were not so indeed, the captain, having calculated upon the discharge of the outward lading, and having his ship full

[p] Mol. b. 2. c. 4. s. 3. [q] Mol. b. 2. c. 4. s. 5. [r] 2 Taun. 295.

full loaded with a return cargo, if the former of these events took place and not the latter, could not perhaps safely put to sea on his return home, for want of sufficient weight to navigate and ballast the ship; which is too preposterous an idea to entertain for a moment, especially as the taking of ballast on board cannot prejudice the freighter, in case of his neglect or inability to provide a cargo. But there is the same reason why the master should not be prohibited from loading goods of other persons in such case, if he can get them instead of ballast; though no more reason why the freighter should be benefited in the one case any more than the other, as it is not by his procurement, or even with his privity, that either the return goods or the ballast is provided.

Not subject to reduction for freight earned.

Where the freighter stipulates, that in the event of his not being able to provide a cargo, he will pay a fixed sum, the captain has a right to take goods on board on his own account, or on account of his owner, or both. He is at full liberty to make what other profit of the ship he can; for in contracting he doubtlessly would insist on more or less liquidated damages, according to the chance he foresaw of getting freight home from the place where he was going. There is therefore no reason why the person who has stipulated to pay such liquidated damages should be discharged from any part of the sum fixed, on account of the profit which the ship-owner may make by the cargo supplied by any other person[a]. A ship was chartered to carry part only of a cargo to Petersburgh, and bring back

[a] Bell v. Puller, 2 Taun. 299.

back a return cargo to London; and the freighters stipulated that if a return cargo could not be obtained within a limited time, the master should be at liberty to return with his ship to London or any other port in England, and upon her arrival at such port they would pay him £2700, with a per centage, &c. The ship not being permitted by the Russian government to unload her outward cargo, and the freighters' correspondents refusing to load any homeward goods, the master after waiting the limited time sailed for Stockholm, where he took in a quantity of hemp on account of his owners for the freight of which he was paid £2278. 0*s*. 9*d*. and a small quantity on his own account, for the freight of which he received £225, making together £2503. 0*s*. 9*d*. On his arrival in England, he delivered the lead to the freighters in London. And it was held upon the above grounds, that the freighters were liable to pay the whole £2700 for dead freight, together with the per centage, &c. without any deduction by way of set-off or otherwise, on account of the freight which had been earned on the homeward voyage[t]. Sir James Mansfield, C. J. in delivering the opinion of the court, said, that supposing the captain was bound by his covenant to bring back the lead for the £2700, it was nothing more than a contract to bring back a certain quantity of goods, not indeed according to a rate of freight proportioned to any certain bulk or weight, but merely as a waggoner might agree for a gross sum to carry goods in his own waggon from London to Exeter or elsewhere; and considering it as a mere contract to carry

[t] Bell *v.* Puller, 2 Taun. 285.

carry goods to England, he saw no reason why the captain might not earn what else he could by taking other goods on board for his own benefit. Both the C. J. and Heath, J.[u] said, that the point was not argued or taken by the counsel in the case of Puller and Staniforth in the court of King's Bench[v], which his lordship observed, was very similar to that of Bell and Puller; though there the captain did not bring home the lead, but instead thereof went to Stockholm and, sold the lead, and got other goods and brought them home. The plaintiff there called on the insurers on a very singular insurance, viz. the underwriters agreed to pay a total loss in case the ship was not allowed to load a cargo at Petersburgh. This was in effect an insurance of the voyage, and Messrs. Puller demanded the sum of £2500, thinking they were bound to pay that to the owner; but it was said for the defendant that he was not obliged to pay the whole, but was entitled to a deduction of the freight which the captain obtained at Stockholm. This strong difference subsists between the two cases: there the lead was the property of Messrs. Puller, but was not brought back, it was sold at Stockholm, and for aught that appears, the means which the captain had of obtaining any freight at Stockholm might arise from the use he made of the lead there; and on that account perhaps, the court of King's Bench might think that the captain, who had not been authorized or directed to act thus, but had done all this for his own benefit, should not be entitled to that profit, leaving the underwriters to pay the whole £2500[w].

In

[u] 2 Taun. 296. [v] 11 East 232. [w] 2 Taun. 299, 300.

In the case of Bell and Puller it was observed by Mansfield, C. J. in giving the judgment of the court, that in common cases of charter-parties, there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the foreign port, and if he does not, the plaintiff has his action against him[x]. His lordship did not say, whether in those cases, if the captain obtained homeward freight of any other person, it might or might not be deducted from the damages, or be admissible evidence to reduce the amount of damages to be recovered. The learned judge confined himself to the case before the court, where, instead of leaving the damages open, the freighter stipulated that if he could not provide a return cargo for the captain, he would pay him a certain sum as liquidated damages. But it seems very difficult to give any reason for a distinction between the two cases; for in each of them, the right of action upon the charter-party, and to such damages as are occasioned by the breach of contract to load the ship with a return cargo, is vested immediately upon the freighter's refusal to furnish such cargo. It seems that an action might be maintained for those damages immediately upon such refusal; at all events at the expiration of the appointed time to furnish such cargo, where a particular period is appointed for that purpose. And there appears to be no more reason why, in either case, any sum which the ship may, by good fortune, earn for the freight of goods furnished by any other person, in the event of the freighter's refusing to supply any goods himself, should go in reduction of the damages he has made himself liable to by his breach of contract,

Qu. If no particular sum be stipulated?

[x] 2 Taun. 299.

tract, than that in the common case, where one person has engaged to employ another to do any particular work, and afterwards fails to employ him according to his contract, and a third person employs him to do some other work of the same sort, which occupies the time of the person so employed that would otherwise have been spent in the service of his first employer, his earnings should go in reduction of the damages to be recovered against such employer.

If subject to such reduction, it is not by way of set off.

In the argument of the case last cited, it was intimated by Mansfield, C. J. and Heath, J. that supposing the freight earned by the master, on his own and the owners' account, was to go in reduction of the sum of £2700 agreed to be paid for dead freight, it might have been deducted without a set-off, as payment to the plaintiff *pro tanto*, and given in evidence on *nil debet*, if money received, as this was, without the defendant's knowledge or privity, could be considered as money received for them[y]; which they seemed to doubt, and not without manifest reason. The truth is, there was no privity whatsoever between the parties in the contract for, or payment of the sums earned for freight; but if there had been, and the plaintiff's claim had been by agreement or otherwise subject to the deduction contended for, there can be no doubt but that it would have gone in reduction of the plaintiff's demand, and not have formed a cross or counter claim by way of set-off; though it would, it seems in that case, have been necessary to plead the circumstances specially, supposing them to have operated as payment *pro tanto*; or

[y] 2 Taun. 294.

or they might perhaps have been given in evidence in reduction of the damages sustained by non-payment of the £2700, without any plea at all for the purpose. If the charter-party was under seal, as it appears to have been, the general issue of *nil debet* certainly was not a proper plea; the deed being the foundation of the action, which is the reason it must be specially declared upon[z]. Perhaps it may be pleaded, that the sum in question *never was*[a] nor is in arrear to the plaintiff[b].

Consequence of rejection of offer to allow return freight.

If an offer be made to allow the *return* freight against the *full* freight, and such offer be rejected, the court will not sfterwards compel the plaintiff to abide by his offer, or reduce the amount of the verdict, to which he is by law and justice entitled, to the sum claimed by his particulars of demand. In the case of Bell and Puller, the freight covenanted to be paid was at the rate of eleven guineas *per* ton, and the tonnage was agreed to be upwards of three hundred and four tons. It was therefore argued that if a full return cargo had been provided, the plaintiff would not[c] have got more than he would by the £2700, together with the freight earned; but the plaintiff had said, pay me what you would have paid if a full return cargo had been obtained at Petersburgh, and I will allow the return freight out of it. It does not appear how that would have left the balance; but since it had been rejected, the plaintiff was held to be entitled to his £2700.

[z] Atty *v.* Parish, 1 N. R. 104. [a] See Cowp. 588. [b] See 2 Taun. 346. [c] The report, seemingly by mistake, omits the word "not."

£2700. The rule therefore which had been obtained for reducing the damages from £3121. 16*s*. 6*d*. to £648. 13*s*. 9*d*. by deducting the return freight, was discharged[d]. The plaintiff in this case having entered up judgment for the sum of £3121. 16*s*. 6*d*. found by the verdict, Best Serjeant afterwards moved that the judgment might be restrained to the sum claimed by the bill of particulars, which was a balance of £1617. 11*s*. only. He said, that if it had been understood at the trial that the plaintiff was proceeding to recover a greater sum than this, he would not have been permitted so to do, but he would on the verdict found obtain as the whole produce of his voyage £5523. 16*s*. whereas if the defendants had supplied him with a full return cargo, he could not have been entitled to more than £4019. 12*s*. 6*d*. The court however observed, that in an earlier stage of the cause the defendants had rejected the plaintiff's offer, to put the case on the same footing as if they had provided a full homeward cargo, and they must now abide by their election. It was hard enough to tie up a plaintiff at the trial by his particulars; and although he had there gone beyond it, he had obtained no more than the judgment of the court gave him, and no injustice was occasioned by the excess; they therefore rejected the application[e].

[d] 2 Taun. 300. [e] *Id.* 300, 1.

CHAPTER

CHAPTER VII.

OF DEMURRAGE.

Difference between dead freight and demurrage.

THE difference between dead freight and demurrage is this, that the former is payable in case of the merchant's failure to furnish any cargo at all, or such a cargo as he ought; but the latter becomes due though a proper and sufficient cargo be furnished, if it be not provided, or received, from the ship in the time allowed by the charter-party. In considering the subject of demurrage, it will be proper to enquire more particularly, 1st, the nature of it, the mode of computing the time allowed as days of demurrage, in the case of an *express* covenant for the payment of it, and what constitutes an *implied* covenant for that purpose; 2dly, in what cases it is payable under such covenants, and the duration and revival of the claim; 3dly, the rate and extent of it; and lastly, who are liable to be called upon to make the payment.

Lay days, and days of demurrage, what.

Demurrage may be defined, the compensation to be paid by the freighter to the owner or master of the ship, in case she is detained beyond her *lay days*, viz. those allowed by the contract for her laying to load and

unload the cargo; or if no particular time be limited by either of them for that purpose, in case the ship be detained beyond a reasonable time for her loading or unloading; not to exceed which time, the law will imply an understanding and agreement of the parties, in the absence of any express contract. In general, a certain rate of compensation is provided by the charter-party for the ship's detention for a fixed number of days, after the expiration of her lay-days, which extra days are called *days of demurrage*[a]. Any additional number of days which the ship may be detained beyond the expiration of that period come under the same denomination; and for both, the owner or master of the ship has a right to compensation from the freighter or merchant, if, as it usually happens, he causes the delay. The only difference is, that the compensation for the stated number of days is generally, though not necessarily, limited by the charter-party, so that it is known what is to be paid for that time; but for the subsequent delay the merchant is answerable, to any amount of damages, which may be occasioned by the subsequent detention of the ship. Demurrage may become due either by the ship's detention for the purpose of loading or unloading the cargo, either before or during or after the voyage; or of waiting for convoy[b]. By the laws of Oleron and Wisby, a particular time is appointed for loading and discharging the cargo, and the demurrage is apportioned amongst the master and mariners[c]. But in the case of a contract of affreightment by charter-party, the time allowed for the above purposes, and the rate of compensation for that time, or for

[a] See Beawes, 142. [b] *Id.* [c] Leg. Ol. 21. Leg. Wis. 34.

for exceeding it, and the persons by whom and to whom it is payable, must all depend upon the contract, unless so far as it may be necessary to explain its meaning by the usage and custom of merchants.

Where they shall be construed running or working days.

Where by the charter-party or bill of lading, the freighter covenants with the master to unload the cargo in a certain number of days generally or pay demurrage, it means working days and not running days[d]; though it is best to express in the contract which is meant; and that is usually done to avoid all disputes upon the subject, especially as witnesses called on such subjects are likely, either from ignorance or dishonesty, to differ in their testimony. Working days it seems do not include Sundays or custom-house holidays, but only such days as are in the literal sense of the word working days, in work of a similar nature. When there is a doubt upon the language of contracts of this sort, it must be explained by the usage. Accordingly, where a question of this nature came before Lord Eldon at *Nisi Prius*, when that noble Lord was Chief Justice of the Common Pleas, he left the question to a special jury of merchants, and they found a verdict for the defendant, construing the general words of the contract to mean working, and not running days. "If (said his lordship) no evidence had been offered, and I was to decide on the clause itself, I should have been of opinion it meant running days; and if so, the parties must abide by the contract, though incapable of performance. If it had been the case of inland trade, it must have meant working days, as the

[d] Cochran v. Retberg, 3 Esp. 121.

the law of the country prohibits the working on any other[e]."

An agreement by deed that so many days shall be allowed for loading, &c. constitutes a covenant not to keep the ship longer.

A covenant is nothing more than an agreement of the parties under seal; and if they covenant together that it shall be lawful for one to hold the other's property for a certain time, that is emphatically an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if therefore he detain it beyond that time, it is a breach of his covenant. And where, in a charter-party under seal, it is agreed between the parties that a limited number of days shall be allowed for unloading, and so many for demurrage, that is an implied covenant not to detain the ship, &c. beyond the stipulated number of days. The possession of the ship beyond the specified time by the freighter is therefore a breach of such implied covenant; and an action of covenant may well be maintained upon it[f]. In the case cited, it seems to have been considered by some of the judges[g], that such a clause as the above amounted to an *express* covenant between the parties, that the stipulated time only should be allowed for the detention of the ship, and that covenant therefore was not merely the proper, but the only remedy; for where there is an express contract by deed between the parties, no promise arises by implication of law out of the terms of such contract, on which assumpsit can be maintained. But the plaintiff having declared in covenant, which was held his proper remedy, the question did not arise whether assumpsit could have been maintained[h].

The

[e] Cochran *v.* Retberg, 3 Esp. 121. [f] Randall *v.* Lynch, 12 East 179. [g] Le Blanc and Bayley, J. [h] See 12 East 578.

The person who hires a vessel is liable to demurrage, if at the end of the appointed time he does not restore her to the owner. He is responsible for all the various causes and accidents which may prevent him from so doing. If therefore the goods remain on board the vessel in the London Docks, and cannot be unloaded on account of the crowded state of the docks, which renders it impossible for the owner to make any use of her, she is to all intents and purposes detained there by the freighter, where upon her being brought into the docks all is done which depends upon the owner; for the Dock Company are the freighter's agents for the delivery, and the freighter is as much answerable for the delay arising from the want of a birth, as if it had arisen from tempestuous weather or any other cause[i]. But this liability may and should be provided against by an express exception in the charter-party. It seems, from what is reported to have been said by Mansfield, C. J. in the case of Johnson and Greaves[j], that if the detention be by the illegal act of a third person, that will prevent the right to recover demurrage. But the true reason why it was not recoverable in that case appears to have been, the same as prevented the recovery of freight, viz. that the goods had been unjustifiably disposed of by the captain, and there was no right and true delivery of them to the consignees.

Freighter is liable for detention in London Docks.

In Randall and Lynch, a specific period of forty days was fixed by the charter-party for loading and unloading the cargo. Where no time is fixed, but the stipulation

But if the *usual* time be allowed, and the ship be discharged in her turn into the *bonded* warehouses, *covenant* will not lie.

[i] Randall *v.* Lynch, 2 Camp. 352. See also Moorsom *v.* Greaves, *Id.* 627. *Ante*, 99. 131. acc. [j] 2 Taun. 356, 7.

tion is, that the freighter shall be allowed the usual and customary time, to unload the ship in her port of discharge, it becomes an inquiry upon the evidence, what is the usual and customary time for unloading the particular cargo in question? And since the bonding system has been introduced, in the case of wines or the like; it is when the ship gets a birth by rotation, and the wines can be discharged into the bonded warehouses: if she be unloaded within that time, there is no breach of the implied covenant in the charter-party not to detain her beyond the usual time. In covenant on a charter-party, for a voyage to Oporto and back to bring home a cargo of wine, whereby the plaintiff agreed that the freighter should be allowed the usual and customary time to unload the vessel at her port of discharge, the declaration stated that the ship arrived at London, her discharging port, on the 26th of August, and that the usual and customary time for unloading was seven days, but that the freighter (the defendant) kept her forty-nine days over and beyond that time for that purpose, whereby the plaintiff was deprived of the use of his ship during the time she was so detained. It appeared that the vessel actually entered the London Docks on the 25th of August, and was reported the following day. On the 31st, the wines were bonded by the defendant, and he was ready to have received them if they could have been unloaded. But from the crowded state of the docks, the ship could not get a birth till the 20th of October, and was not fully discharged till the 26th of that month. If the duties had been immediately paid upon the wines, they might have been landed in a much shorter time; but the superintendant of the docks said, that he had never, since the bonding system was introduced,

troduced, known the duties paid on landing a cargo of wines, brought by so large a vessel; such cargoes had always been bonded. The attorney-general contended, on the authority of the case of Randall *v.* Lynch[k], that the freighter was liable for the detention of the ship in the docks, beyond the time when she might have been discharged had the duties been immediately paid. But Lord Ellenborough ruled otherwise; observing that according to the evidence, the usual and customary time of unloading a cargo of wines in the port of London was when the ship got a birth by rotation, and the wines could be discharged into the bonded warehouses; and that although the wines might have been landed sooner by an immediate payment of the duties[l], yet since the bonding system had been introduced, that had ceased to be the usual and customary mode of landing such a cargo; he was therefore of opinion that the defendant, not having broken the implied covenant arising from the terms of the charter-party, was entitled to a verdict; and the jury found accordingly[m].

Nor can an action of *indebitatus assumpsit*, in such case, be maintained for demurrage or the use and hire of the ship, if there be no stipulation in the bill of lading for demurrage or unloading the goods in any particular time. In the case alluded to, the defendant was consignee of a cargo of brandy, brought from Charente to London in a ship of which the plaintiff was master. The declaration was in assumpsit for demurrage, with counts for the use and hire of the ship. Supposing the brandies were to be bonded, the defendant

Nor assumpsit.

[k] 2 Camp. 352 [l] See Struck *v.* Tennant, Abbot, 196. [m] Rodgers *v.* Forrester, 2 Camp. 486.

defendant was not guilty of any wilful delay. It appeared to be the invariable practice to bond cargoes of this sort; and that the delay was occasioned by the extremely crowded state of the docks. Mansfield, C. J. was of opinion that this case could not be distinguished from that of Rodgers and Forrester[n]. The law could only raise an implied promise to do what was there stipulated for by an express covenant, viz. to discharge the ship in the usual and customary time for unloading such a cargo. That had been rightly held to be the time within which such a vessel could be unloaded in her turn into the bonded warehouses. The jury accordingly found a verdict for the defendant[o].

Freighter not liable for detention occasioned by the master or mariners.

There can be no doubt but that the freighter cannot be charged with demurrage for a delay occasioned by the captain himself, or his mariners. But it has been held a sufficient plea to an action of covenant on a charter-party of affreightment for demurrage, that the delay was occasioned by the neglect of the mariners to attend with the boat to relade the ship, as covenanted by the master[p]. In the case cited, on demurrer to such a plea the plaintiff had judgment: but it certainly appears that the principal point considered in that case was, whether the breach of independent covenants could be pleaded in bar to each other; and it was properly held that they could not.

Demurrage, where a ship is chartered for outward voyage only, and art of brought back.

Where a ship is chartered upon a voyage outwards only, without any reference to her return, or contemplation of a disappointment happening, it is a singular thing

[n] Rodgers v. Forrester, 2 Camp. 486. [o] Burmister v. Hodgson, 488. [p] Cole v. Shallett, 3 Lev. 41.

thing that there has been no decision upon the question, what shall be done in case the voyage is defeated. The books throw no light on the subject. The natural justice of the matter seems obvious, that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. But his doing so appears to be wholly voluntary; and without obligation. Yet if it were a cargo of cloth, or other valuable merchandize, it would be a great hardship if he were to be at liberty to cast it overboard. However, where the bill of sale contained a general consignment, and it appeared that the goods were absolutely sold to, and had become the property of the consignees, the Chief Justice observed, that all that had been done for the preservation of the cargo was done for them, and not for the defendant, the freighter of the ship; and if any liability were raised by implication of law, the right of action was against them. The plaintiff, therefore, was held not entitled to recover his claim for demurrage against the defendant[q].

Of the necessity of a protest.

Beawes intimates the necessity of a protest to enable the master to recover demurrage[r]. But this, though prudent, is not strictly necessary to be made by the master to entitle him to his freight or demurrage, in a court of common law; nor is it evidence for him in such a court, if made.

Duration and revival of the claim.

The payment of demurrage, stipulated to be made while a ship is waiting for convoy, ceases as soon as the

[q] Christy v. Row, 1 Taun. 315. But see 2 Taun. 289. 291. [r] Beawes, 142.

the convoy is ready to depart; and such payment, agreed to continue while a ship is waiting to receive a cargo, ceases when the vessel is fully laden, and the necessary clearances are obtained, although the ship may in either case happen to be further detained by adverse winds or tempestuous weather. And if after having once set sail on her voyage, she is driven back into port, the claim of demurrage is not thereby revived[s].

Limitation and extent of the claim.

The claim of demurrage is, equally with that of freight, affected by any condition precedent in the charter-party[t]. And on the other hand, any exception in the charter-party or discharge from the performance of such condition, which would entitle the party to freight, will also entitle him to demurrage[u]. The extent of this claim must depend on the express stipulations in the charter-party, and the usage amongst merchants. Sometimes it is both politic and just to submit to a compromise, rather than adversely to litigate questions of this sort[v]. The meaning of the parties is to be collected from their contract. It would be dangerous to substitute other words for those used by themselves, which would be substituting one contract for another; therefore, where the words of the contract give demurrage only while the ship is waiting at one place, or discharging at another, it cannot be claimed during any other periods than those specified in the contract[w].

The

[s] Lannoy *v.* Werry, 2 Bro. P. C. 60. Jamieson *v.* Laurie, 6 Bro. P. C. 474. Abbot, 196. &c. [t] Hume *v.* E. I. C. 1 Blac. 291. [u] Hotham *v.* E. I. C. Doug. 277. *Et vide ante*, 77. [v] Hume *v.* E. I. C. *suprà*. [w] Marshall *v.* De la Torre, 1 Esp. 367.

Rate of demurrage how regulated.

The price or rate of demurrage may be regulated by the burthen of the ship[x], or the quantity of goods she is freighted to carry, or the damage which she is likely to receive from remaining in the port where she is detained, or the loss sustained by not being able to employ her in another service, or the like. It is generally stipulated in the charter-party to be payable daily, as it becomes due[y]; so that if any accident afterwards happens to the ship, which may prevent the freight becoming due, the demurrage may yet be payable.

Rate in charter-party is evidence of sum due for extended time.

If a chartered ship is detained beyond her days of demurrage, *primâ facie* the sum payable for those days is also the measure of compensation for the extended time. This is a rule both of convenience and justice. But it is open to the ship-owner to shew that more damage has been sustained, and to the freighter to shew that there has been less than would thus be compensated. In covenant upon a charter-party, for detaining a ship beyond the stipulated time of demurrage, the plaintiff claimed a compensation for the extended time, at the rate mentioned in the charter-party for the stipulated days of demurrage, and the defendant only paid into court half that rate. Lord Ellenborough left it to the jury to say whether the owner was entitled to so much as he claimed; and the jury found for the plaintiff at the rate of £7 a day, upon the principle above stated; eight guineas a day being what the plaintiff claimed, and the defendant only having paid into court at the rate of £4[z].

With

[x] Beawes, 142. [y] Id. [z] Moorsom v. Bell, 2 Camp. 616.

What due, if no rate fixed.

With respect to the rate by which demurrage is to be calculated, there is no particular custom of trade to fix it, in the absence of any express stipulation in the contract[a]. However if there be no particular contract respecting it, the amount must be governed by the opinions of mercantile men, conversant with such subjects, as to what may be a reasonable compensation for the use of the ship for the time, and under the circumstances she is detained.

Who is liable for demurrage; freighter, or consignee.

It is scarcely necessary to observe that the party covenanting to pay demurrage, whoever he be, is liable for it upon the charter-party[b]; but, we may remember, if that only provides for the demurrage of the outward voyage, and the ship is detained on demurrage afterwards for the benefit of the consignees of the cargo, they are alone liable to make compensation for such detention; not on the charter-party, but upon an implied contract evidenced by their subsequent acceptance of the goods on their return, which may be made the ground of an action of *indebitatus assumpsit*[c].

Assignee of bill of lading.

Where the bill of lading is in the usual form, making the goods deliverable to the order of the shipper or his assigns, paying freight for the same with primage, &c. and demurrage at so much per day; if the cargo is not discharged within a certain time, and the defendant accepts the goods, it is upon the condition of his conforming to all the stipulations of the bill of lading, one of which is the payment of demurrage, to which

[a] 1 N. R. 107. *Per* Mansfield, C. J. [b] 1 Taun. 300. 2 Taun. 289. 321. 301. [c] *Id. Ante*, 137.

which he is liable[d] as much as for the freight; which it has been lately more than once decided, in the courts of King's Bench[e] and Common Pleas[f], he is, though the contrary was once held by Lord Kenyon at *Nisi Prius*[g]. The bill of lading almost always contains the condition respecting the payment of freight, but not so universally that for payment of demurrage, as that is only a casual charge. Where the latter stipulation is not inserted, it may yet be a question, whether any other than the original parties to the bill of lading can be charged upon it; though there does not seem to be any reason why the *implied* contract, which would certainly arise against the shipper in case of no assignment, should not be in force against his assignee, as much as that evidenced by the *express* terms of the bill of lading; as it is the circumstance of the acceptance or detention of the goods *by the latter* in either case which makes *him* liable: and the law will rather *imply* the contract for compensation against the party receiving the benefit. These observations of course only refer to cases where there is no charter-party under seal; for no other than the parties to such an instrument, or their personal representatives, can be sued upon it.

[d] Dobbin *v.* Thornton, 6 Esp. 16. [e] Cock *v.* Taylor, 13 East 399. Wilson *v.* Kymer, M. 53 *Geo.* 3. [f] Sagart *v.* Scott, 6 Esp. 22. [g] Artaza *v.* Smallpiece, 1 Esp. 23.

CHAPTER

CHAPTER VIII.

OF THE FREIGHT FOR THE CARRIAGE OF THE GOODS.

Freight, what it is.

DEAD freight, we have seen[a], is a compensation payable for the hire of a ship, entirely or in part, whether any goods be loaded or not; but freight properly so called, necessarily supposes goods to have been loaded and carried to their destination; and therefore for distinction's sake may be termed live freight, or freight for the carriage of goods. It is the sum agreed to be paid for the carriage of goods on board ship, to her destined port, or ports[b]; for the arrival of the ship in safety is said to be the mother of freight[c], which itself is said to be the mother of wages. Not being in it's nature payable till after the performance of the voyage, a declaration for a sum agreed to be paid, by the name of freight, for the carriage of goods, on delivery of the bill of lading before the commencement of the voyage, is bad[d]. The term freight is sometimes used to signify the goods

[a] *Ante*, 117. [b] Beawes, 133. [c] Abernethy *v.* Sandall, Doug. 539. And see Dobree *v.* E. I. C. 13 East 290. [d] Blakey *v.* Dixon, 2 B. & P. 321. 13 East 300.

goods themselves loaded on board the ship to be carried, instead of the sum agreed to be paid for the carriage of them; but it is more commonly and accurately used in the latter sense.

Different modes of affreightment.

The charter-party may be entered into, and the freight made payable, for the whole or part of the ship, or cargo; or for the whole or part of the voyage; or by the month, or other stipulated period[e]. The mode in which the freight is made payable by the charter-party, not only regulates the amount which is to be received, but frequently influences the question whether any freight at all be payable. Care therefore should be taken, in framing the charter-party, to stipulate for the freight in such a way as will best answer the intention of the parties, and be most proper for the voyage in contemplation. In framing this part of the contract, the particular nature of the intended voyage is material to be considered, as well as the burthen of the ship; as will appear by the following observations.

Freighting by the great.

Malyne, in his *Lex Mercatoria*, puts several cases of affreightments of each of the above sorts. If, says he, a ship be freighted by the *great* (that is, where one gross sum is payable for the whole freight), and the burthen be expressed in the charter-party, (as, two-hundred tons,) for a certain sum of money, that sum is to be paid, although the ship be not of the stipulated burthen[f]; but if there be a warranty as to the burthen of the ship, the freighter may recover his damages for

[e] Mol. b. 2. c. 4. s. 1. [f] Mal. 100. Mol. b. 2. c. 4. s. 8.

for the breach of it. If the ship be freighted in the like manner, and the burthen not exptessed in the contract, the sum agreed upon must of course be paid, whatever may be the ship's burthen[g]. If no sum be expressed, then so much is payable as is customary in the like voyages[h]; or, if there be no customary sum, then what is reasonable, according to the opinions of experienced mercantile men. It is certain, that if a ship freighted by the great be cast away in her voyage, the freight is lost[i].

By the ton. If a ship, described in the charter-party as a vessel of a certain burthen, be freighted by the ton, and be found of less burthen, no more freight is to be paid than for so many tons as she has carried and delivered[j]. If she be freighted for a certain tonnage, as, two-hundred tons *or thereabouts*, these latter words are commonly understood to mean within five tons more or less, as the moiety of ten whereof the whole number is compounded[k]. But if the merchant covenant to furnish a full and complete cargo, and fail to do so, he is liable to an action on his covenant for damages for the deficiency[l]. Where a ship, not named of any certain burthen, is freighted by the ton, of course if she be full laden according to the charter-party, freight is payable for every ton; otherwise it is payable for so many tons as are laden on board[m]. Where the payment is to be by the ton, and there is no stipulation for any less quantity, it seems that no freight

[g] Mal. 100. [h] *Id.* Mol. *ubi. supra.* [i] Beawes, 138. [j] Mal. 100. Lady James *v.* E. I. C. Abbot, 287, 8. [k] Mal. 100. Mol. b. 2. c. 4. s. 8. 16. [l] *Ante*, 117. [m] Mal. 100. Mol. b. 2. c. 4. s. 8.

freight is payable for any number of hogsheads not amounting to a ton[n]; therefore it is proper in such case to stipulate in the charter-party, that a proportionate freight shall be paid for any less quantity than a ton; or that the freight shall be payable at the *rate* of so much *per* ton, which will answer the same purpose[o].

By the pack, &c.

If freight be agreed upon at a certain rate for every pack, barrel, butt, or pipe, &c. without regard to the burthen of the ship, there can be no doubt but that it is to be paid accordingly. If a ship be freighted by the ton, or pack, &c. and some of the goods be cast away and others saved, it seems that freight is due for those saved, *pro ratâ*. Yet this is said to be questionable, as the insurers ought not to be charged with any freight, in case of abandonment[p]. When such misfortune happens, the freighter commonly abandons those goods which are saved to the assurers, which go in part satisfaction of what they pay by virtue of their subscriptions[q]. It is said to be the merchant's duty to see that his goods are properly marked[r]; and they should also it seems be directed, especially if they are to be delivered at different ports.

Extra goods.

Malyne says, that if a merchant put more goods into a ship than she is freighted to carry, the master may take what freight he pleases[s]. And so it is according

[n] Rea v. Burnis, 2 Lev. 124. [o] *Id.* [p] Mal. 100. Mol. b. 2. c. 4. s. 14. [q] Mol. *ubi supra, notis,* 9th ed. [r] Mal. 99. [s] Mal. 99. Mol. b. 2. c. 4. s. 9.

according to Beawes, if the goods be brought into the ship secretly and unknown to the master[t]. But this must not for a moment be considered as giving him a power of making any unusual or unreasonable charge for the freight; which he cannot by law be permitted to do for any part of the goods. The true rule upon these occasions, in analogy to the law in other cases, seems to be, that so far as any particular rate of payment is fixed by the contract, and a computation can be made at that rate, it must be followed; but for the carriage of any goods beyond the contract, the master or owner is intitled to be paid at the usual price for such goods, or if there be no customary price for them, then a reasonable compensation for the benefit received from the carriage; on the same principle that if no sum at all be mentioned for the freight of the ship or any part of the cargo, such freight is payable as is customary or reasonable.

Prohibited goods.

If the ship, by any fault of the freighter, as by his loading prohibited commodities, be detained and prevented from proceeding on her voyage he shall nevertheless pay the freight agreed for[u]. This must be udcrstood of the loading of contraband or illegal goods by the freighter, without the knowledge of the captain or owners of the vessel; for if they be parties to the illegal transaction, they cannot claim a benefit from it. But if that be not the case, the loading of such goods cannot be considered as the loading of any cargo at all under the charter-party; for we have seen, that the captain is not bound to receive illegal goods[v]: and

[t] Beawes, 137. [u] Mol. b. 2. c. 4. s. 9. [v] *Ante*, 36.

and in that event, the sum agreed for will be recoverable in damages, as dead freight, provided the voyage be wholly lost. If the voyage be not lost, but the ship is detained and prevented for a time only from proceeding on her voyage, on account of the goods improperly loaded by the freighter, then he will be subject to demurrage for that time, at the rate and according to the provisions in the charter-party.

When freight is due; on performance of the voyage.

Freight is generally due on the performance of the voyage: although it be made payable at the shipping port, the voyage must be first performed. The receiving of goods on board the ship is a sufficient consideration for an express promise to pay the freight immediately[w]; but no such contract can exist without express stipulation. And where some of the bills of lading expressed that the goods were to be delivered at a foreign port, "freight for the goods being paid in London," and others, "the shippers paying freight for the goods in London," it was held not sufficient evidence of a special contract to pay freight on the shipment of the goods at London, but rather that it should be payable there, after the performance of the voyage. The plaintiff declared specially upon a contract, supposed to arise out of such bills, to pay the freight upon the shipment of the goods; and it appeared that the ship was lost in the Downs. Lord Ellenborough said, that the words in the bills of lading only meant that the freight should be paid in London, instead of the foreign port of delivery; and therefore

[w] Blakey v. Dixon, 2 B. & P. 321.

therefore by no means dispensed with the performance of the voyage. He added, that if the defendants had paid the freight upon the shipment of the goods, they might have recovered every penny of it back again[x].

On receipt of the goods.

It is said that by the course of merchants, freight is payable on the receipt of the goods[y]. Accordingly Beawes observes, that the freight becomes due by the delivery of the goods, and not on the bringing up of the ship at her port of discharge[z]. According to the laws of Wisby, the ship being arrived at her port of discharge must be unladen, and the master paid within eight or fifteen days at furthest, according to the nature of the voyage[a]: and where a ship is freighted for the whole summer, the freight shall be due upon St. Martin's day the 11th of November[b]. But the days of payment of the freight are usually regulated by express contract contained in the charter-party or bills of lading; which commonly stipulate not only as to the time but also the manner of payment, for the carriage of the goods as well as all other customary charges respecting them, as, primage and average, &c. and whether they are to be paid in bills, and at what dates. It would be well if the particular sort of bills were also to be made the subject of express stipulation, as, by whom they shall be drawn or accepted, &c. Where bills are to be given, the party can in no case maintain an action for the freight, until the time of credit is past, at which the bills if regularly given would

x Masheter v. Buller, 1 Camp. 84, 5. y Newland v. Horseman, 2 Chan. Ca. 75. See also Christy v. Row, 1 Taun. 300. z Beawes, 138. a Leg. Wis. 52. b *Id.* 7.

would have become due: before that time, he can only sue for and recover any damages he may sustain by not having the bills; though after the expiration of that time, he may declare generally for the amount of the freight and other charges due, without adverting to the stipulation for the payment in bills; that is, if the contract be by parol or in writing not under seal[c], for if by deed, it must be especially declared upon[d].

Where no freight payable, or only for the outward voyage.

Unless there be a special proviso to the contrary, if a ship be freighted for an outward and homeward-bound voyage at one entire sum, there is nothing due until the whole voyage is performed; so that if she be lost or taken in her homeward voyage, no freight can be claimed either for that or her voyage outwards[e]. But if a ship be freighted at so much for her outward and so much for her homeward voyage, or to go from one port to another, and she arrives at her first port of delivery, and there unloads and takes on board another cargo, and then sails homeward or for another port, but in her passage thither and before any part of her second cargo is unloaded she is lost, the owner may recover freight for the first cargo, though not any thing for the second; for every one it is said must bear his share of the loss: which is also given as the reason why mariners, in such cases, lose their wages[f]. If a ship be freighted from one port to another, and thence to a third and fourth, and so home to the port from whence she first sailed, (which is commonly called a trading voyage,) this is considered but as one voyage, if that construction be in conformity to the charter-

[c] 1 Esp. 245. 1 East 155. 4 East 147. 3 B. & P. 582. 1 N. R. 331.
[d] 1 N. R. 104. [e] Mal. 98. [f] Anon. Sid. 236.

charter-party[g]. Hence it is, that if the whole voyage be not performed, and the whole cargo delivered, where the ship is freighted by the gross, no part of the sum agreed for is due by the common law, though there be no fault in the master, as, if the ship be robbed by pirates[h], unless the particular peril be provided against by a special exception. But by the civil law this is called *vis major*, or *casus fortuitus*, which if not expressly is impliedly excepted; for if the goods had been thrown overboard to lighten the ship that could not have prejudiced the claim of freight, as by both the common law and the law marine, the act of God or an enemy cannot work a private injustice[i].

What words separate outward and homeward voyages.

By express agreement, it is clear however that the parties may make the outward and homeward voyages separate, so as to entitle the master to his freight of the one, though he should not be entitled to freight for the other; and it seems that the courts will lay hold of any expression in the charter-party which can bear this construction, so consonant to the justice of the case. Thus, in the case of the five ships put by Malyne, where there was a proviso in one of the charter-parties that if the ship should be taken or cast away, the *freight outward* should be paid; although neither of these events happened, yet the ship having performed her outward voyage, and being prevented from shipping her homeward cargo from fear of capture, it was adjudged, that on account of the proviso speaking of the outward freight, the outward and homeward voyages should be deemed separate, and the outward freight

[g] Mol. b. 2. c. 4. s. 7. 10. [h] Bright v. Cooper, 1 Brownl. 21.
[i] Mol. b. 2. c. 4. s. 7.

freight accordingly paid[j]. In another case, before Lord Mansfield, where the *outward* and *homeward voyages* were separately named in the charter-party, and the owner covenanted to pay port-charges on the outward voyage, which was completed, though nothing was due on the homeward voyage; that was held sufficient to entitle the owner to recover the freight of the former against the merchants, though the charter-party made no provision for any other case than that of a prosperous adventure out and home[k].

What negatives that construction.

But in order to entitle the owner or master to recover freight for the outward voyage, it is necessary that the outward goods should come to the merchant's hands; and if by the terms of the contract the whole is denominated one *intended voayge*, and it is expressly provided that the freight shall *become due* upon the final discharge of the vessel at her last port of delivery, it cannot be claimed unless the vessel arrive and discharge her cargo at that port, whether the ship be freighted in the gross or by the month. A ship was freighted from Liverpool to Madeira, and thence to Barbadoes, and then back to Liverpool, Greenock, or Bristol; and it was specified in the charter-party that after going to Barbadoes, the ship should proceed to one or other of the three ports just named, *and so end the said intended voyage;* and that there should be paid in full for the freight of the said ship *for the said voyage* the sum of £136. 10*s*. *per* month, the first month's payment in advance; and that the remainder of the said freight should *become due*

[j] Mal. 98. *Ante*, 35. Mackrell *v.* Simond, T. 16 *Geo.* 3. Abbot, 345.

due and be paid on the final discharge of the vessel at Liverpool, Greenock, or Bristol. Before her arrival at Barbadoes she was captured. The merchants paid £135 on account of the first month's freight; and the plaintiff claimed a further sum for freight to the day of her capture, or the completion of her delivery at Madeira. But the court, on a special case reserved from the assizes, held that he had no claim whatever; as by the terms of the contract the remainder of the freight was to become due on the final discharge of the vessel at her last port of delivery, where she never arrived[l].

For bringing home outward cargo.

It seems that the master is entitled to freight for bringing home the outward cargo, if it cannot be disposed of; though the ship be only chartered for an outward voyage, and nothing be said about bringing home such cargo in the charter-party. In the case of Bell and Puller, Sir James Mansfield observed that although the homeward cargo could not be obtained, it was not expressed that the defendants were to have their outward goods brought back; the charter-party imposed no obligation on the master to bring it back to London, to suppose which would be inconsistent with the clause which made the dead freight payable on the ship's arrival at any port in England. This made it a very extraordinary and new case. However the plaintiff in that case was allowed to recover, under the general counts[m], a sum of £46. 14*s.* 6*d.* for expences incurred in bringing the outward goods back to London.

[l] Byrne v. Pattinson, T. 37 *Geo.* 3. Abbot, 347. 2 Taun. 289. Taun. 300.

London[n]. This sum being so much less in amount than the one principally in litigation, the right to recover it was not particularly contested; but it may be fairly inferred that the plaintiff would not have been allowed to recover it, if the court did not think he was fairly entitled to do so.

Freight *pro ratâ itineris*, where recoverable.

It has been a much controverted point, whether the freighter is liable to an *indebitatus assumpsit* for the whole, or any and what part of the freight, where the ship does not arrive at her destined port. The question first came on in the shape of a special case on a point reserved by Lord Mansfield, stating, that the defendant shipped a cargo of fish in Newfoundland on board the plaintiff's ship to be carried to Lisbon, for freight at 2*s.* *per* quintal. The ship was taken by an enemy within four days sail of Lisbon, but afterwards retaken and brought into Biddeford, an English port. The defendant received his goods of the re-captors on payment of salvage; but they could not be sold for so much as their original price, clear of the expence of bringing them to such port; the defendant therefore without delay sent the fish to Bilboa in Spain for a better market, where it was sold for much less than it would have been in England, after clearing the freight and expences. The question was whether the plaintiffs were entitled to any and what freight, and subject to what deduction[p]. In the course of the argument, a determination of the House of Lords[o] was cited to the following effect, that if, in the event of an accident in

[n] 2 Taun. 291. And see Puller *v.* Halliday, 12 East. 496. 506, *per* Bayley, J. [o] Lutwidge *v.* Grey, Dom. Proc. 22d February, 1738, Journals, p. 356. [p] Luke *v.* Lyde, 2 Bur. 882. 1 Blac. 190. S. C.

in the course of a voyage, the master offered a ship to carry the goods to the port of delivery, the whole freight was due; and if he declined carrying any part of the goods to that port, as to them he was entitled to be paid *pro ratâ*, viz. as much as was proportionable to his carrying them to the place where the accident happened. This decision of the House of Lords indeed appears to have been founded on the maritime law, which is not the law of any particular country but the general law of nations. However in the principal case it was adopted by Lord Mansfield, who laid it down as a rule of the common law of this country, that if a freighted ship becomes accidentally disabled on its voyage, without the fault of the master, he has his option of two things, either to refit the *same* ship, if that can be done within a convenient time, or to hire *another* vessel to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage; which point his lordship considered as having been determined in the House of Lords, in the case of Lutwidge and Grey.

Value of the goods delivered is immaterial, if no abandonment.

As to the value of the goods saved, it is nothing to the master whether the goods are spoiled or ot, provided the freighter takes them; for by the carriage of the goods the freight is earned. The master shall be obliged to take all that is saved, or none; he cannot take some and abandon the rest, taking that which is not damaged and leaving that which is; but if the merchant abandon all he is excused freight, and he may abandon though all the goods are not lost. In the principal case, his lordship observed that the capture was without any fault of the master. The merchant did not

not abandon, but took the goods, without requiring the master to carry them to the port of delivery. He could not do so in the same ship, for it was disabled; and the merchant would not desire him to find another, because the freight was higher from Biddeford to Lisbon than from Newfoundland to Lisbon. There could be no doubt but that some freight was due, as the goods were not abandoned by the freighter, but received by him of the re-captors. The question was, what freight? The answer, a rateable freight, *i. e. pro ratâ itineris,* for that part of the voyage which was performed previous to the accident. The salvage paid to the re-captors (half of the whole cargo) was a loss upon the goods, for they were not obliged to agree to a valuation. The master having been at sea seventeen days on the voyage, and being captured within four days sail of the destined port, he ought to be paid his freight for seventeen twenty-one parts of the full voyage for half of the cargo; for it was quite immaterial what the merchant made of the goods afterwards, the master having nothing to do with the goodness or badness of the market[p]. By the laws of Oleron and Wisby, if a vessel happens in her voyage to be damaged, and the merchants and master are at variance, and the merchants require their goods, they may if the master pleases have them, paying freight for that part of the voyage the ship has made, according to the quantity of the goods and the length of the voyage. But if the master please and can readily do it, he may repair his vessel, or he may hire another to finish the voyage; and then he shall have his freight for so much

[p] Luke *v.* Lyde, 2 Burr. 882. 1 Blac. Rep. 190. S. C. [q] Leg. Ol. 4. Leg. Wis. 15. 37.

much of the goods as are saved[q]. By those laws also, if the merchant be short of money, and the master will not give him credit, the latter shall take goods in payment, at the same rate as the rest of the cargo shall be sold by the merchant[r]. But these provisions, especially the last of them, seem peculiarly applicable to the case of a general ship.

Where the goods are accepted by the shipper, after capture, re-capture, and return to port.

A great part of the doctrine laid down by Lord Mansfield in the case of Luke and Lyde, has been since adopted by Mr. Justice Lawrence in the case of Cook and Jennings, wherein he observed, that when a ship is driven on shore, it is the duty of the master either to repair his ship or procure another, and having performed the voyage he is then entitled to freight; but he is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owner of the goods prevents him. Nor is he entitled *pro ratâ*, unless under a new agreement. In Luke and Lyde, the shipper's acceptance of the goods after capture, re-capture, and return of the vessel into port, might have been evidence of a new contract between the parties; but in Cook and Jennings, the plaintiff having resorted to the original contract, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool, and that event not having happened, he could not recover on that contract[s].

Acceptance of part by consignees, in course of voyage.

In the case of Christy and Row, it was held that although the ship was prevented, by the restraint of princes, from reaching her destined port, yet the consignees having ordered and accepted the delivery of part of

[r] Leg. Wis. 37. [s] *Per* Lawrence, J. 7 T. R. 385.

of the cargo at another port in the course of the voyage, and by their default prevented the delivery of the residue, the master might maintain *indebitatus assumpsit* against the freighter, upon an implied contract to pay freight *pro ratâ itineris*, for that part of the cargo which was delivered; although the ship did not proceed to her destined port, but returned back, and then delivered the rest of the cargo. Mansfield, C. J. observed, in answer to the argument derived from that circumstance against the plaintiff's claim to any freight at all, that it might as well be contended that if goods are sent to Exeter, and the consignee meets the carrier and takes them at Honiton, the carrier must proceed with his waggon empty to Exeter, or be entitled to nothing[t]. The declaration in the above case was framed specially; the first count stating the charter-party, what was done under it, and that in consideration that the plaintiff would deliver to the defendant, or his assigns, the cargo at the port to which she had been ordered to proceed, the defendant promised to pay freight and demurrage for it to that port, at the rate stipulated in the charter-party, together with two-thirds of the pilotage and port-charges. It then averred the delivery of the different parts of the cargo as above, and claimed freight for the whole cargo, demurrage before the voyage as well as after the ship's return, and two-thirds of the pilotage and port-charges. There was another count on a promise to pay a reasonable freight for the cargo, or so much thereof as should be delivered. Nothing was said as to the claim for freight back, nor could it, as was observed by the Chief Justice,

[t] Christy v. Row, 1 Taun. 300.

Justice, be recovered in that action, as the declaration contained no count adapted to it; but, as his lordship said, it would probably stand upon the same ground as the right to the demurrage claimed after the ship's return, and which was allowed to be recovered[v].

No freight is due, where ship is captured before breaking ground.

In a late case, where the contract was to bring the goods to England for a certain price, and the ship was captured before she had broken ground, it was held that no declaration could be framed for the recovery of the freight, either in an action on the charter-party, or in *assumpsit*. With respect to the former, the plaintiff could not state a part-performance of the contract on his part, it being entire and indivisible; although by the marine law the parties might recover *pro ratâ*, if the voyage be interrupted. By the common law indeed, where a contract cannot be performed, such a meritorious consideration may arise as will sometimes entitle a party to recover in *assumpsit* for work and labour, even after the contract has been broken. Such is the case where a ship after capture and re-capture completes her voyage, and the shipper receives his goods with the advantage of carriage; in which case that meritorious consideration entitles the master to a recompence, not however on the foot of the old contract, but on a new one springing out of it. However in the principal case, the ship never having arrived at the port of destination, but put into a port at Jamaica, without having conferred any benefit on the freighters by the carriage, or bettered the goods in the smallest degree by the expences incurred, it was held that

v See 2 Taun. 289. 291. *Ante*, 136, 7.

that neither by the marine nor the common law, were the plaintiffs, however unfortunate, entitled to recover[w]. In the case cited, Heath, J. observed, that an argument, which was urged from the supposed hardship arising from the law of insurance, could not be sustained; for the mere hope or expectation of interest was sufficient to entitle the assured to recover against the underwriters. Rooke, J. remarked, that the above doctrine expedited the sailing of the ship; for if the freight commenced before breaking ground, it might induce the master to stay a longer time in port, and so delay the voyage[x]. It has been already observed, in a previous page, that nothing can be due by the common law, for freight, on the loading of the goods; for *primâ facie* the freight is not due until the arrival of the ship, although the defendant may, by a special contract, make himself liable to pay for the carriage of the goods before that period[y].

Where goods are brought back, and taken possession of without prejudice.

In the case of Osgood and Groning it was determined, that under the circumstances stated in the margin, no freight was due. In that case, two issues were directed by the court of Chancery to try, first, whether the plaintiff was entitled to any and what sum of money for *freight;* and secondly, if he was entitled to any thing and what as a *compensation* for the carriage of the goods in his ship from Charlestown to London. There being a charter-party, the terms of which were not complied with, it was considered as clear that the plaintiff could have no claim for freight. And it was observed by Lord Ellenborough, that the plaintiff's right to compensation

[w] *Per* Eyre, C. J. Curling *v.* Long, 1 B. & P. 636. [x] *Id.* 637. S.
[y] Blakey *v.* Dixon, 2 B. & P. 322, 3. *Ante.*

compensation must arise out of some contract, express or implied. There was no express contract set up, but the goods were brought here, instead of being conveyed to their port of destination; and an application being made to the Lord Chancellor, in order to prevent their being tortiously disposed of by the captain, they were taken possession of on behalf of the consignee, without prejudice to the rights of the parties. This was held no acceptance of the goods short of the port of destination; and no foundation for a promise to pay *pro ratâ itineris*. A verdict was accordingly given for the defendant. An application was afterwards made to the Lord Chancellor for a new trial; but his lordship fully approved of the direction given to the jury, and thought that the issues had been properly found. He directed however that an action should be brought by the plaintiff against the defendant for freight, &c. and that if it should appear, that the plaintiff could not have been reasonably required to proceed on the voyage, the defendant should admit that he had accepted the goods in the port of London. This action was tried at the Guildhall sittings; when the jury, being of opinion that the plaintiff might have been reasonably required to proceed on the voyage, found a verdict for the defendant[z]. In another late case, a similar determination to the above took place. The ship was to sail with convoy for Lisbon, and freight was contracted to be paid on right delivery of the cargo. The ship joined convoy, and after having been detained a month, her sailing orders were recalled, in consequence of the occupation of

[z] Osgood *v.* Groning, 2 Camp. 466.

of Portugal by the enemy. She returned to Portsmouth, where, the defendants having refused to accept the cargo, it was unloaded by the plaintiff, and sold by consent of both parties, without prejudice. And it was held, that the plaintiff could not recover freight, or demurrage, there being no acceptance of the goods[a]. In this case, the plaintiff declared in *indebitatus assumpsit* for freight and demurrage, and for the use and hire of the ship, and work and labour, &c.

Bringing action for proceeds of wrongful sale of goods, will not subject the party to freight.

In the case of a tortious unauthorized sale of the cargo by the master, though under the direction of a vice-admiralty court abroad, if the proceeds be remitted to the ship-owners, and the freighter to recover them bring an action for money had and received, this is only a waiver of compensation for the tort, and does not affirm the right to make the sale; but rather disaffirms it, by claiming the payment over of the whole proceeds. Therefore where by the charter-party freight was to be paid at so much *per* ton, on a right and true delivery of the homeward-bound cargo from Honduras Bay to London, and the ship, after capture and re-capture, having been wrecked at St. Kitt's, the cargo was carried by the re-captors into that island, where a sale of it was directed by the vice-admiralty court, on the application of the master acting *bonâ fide* for the benefit of all concerned, but without any other orders, and the proceeds of the sale were remitted to the ship-owners; it was held that the freighters might recover such proceeds in *assumpsit* for

[a] Liddard *v.* Lopes, 10 East 526.

for money had and received, without allowing freight *pro ratâ itineris.* For that form of action to recover the proceeds of the sale was only a waiver of right to compensation for the tortious act of selling, and an adoption of the proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt, such as admitting a set-off, &c.) but did not recognize the right of the vendor to sell the goods. And the sale by the master, (who is only the agent of the ship-owners) not having been authorized by the decision of a court of competent jurisdiction, was an unlawful conversion of the goods, which discharged the claim of the ship-owners for freight *pro ratâ itineris*[b].

Monthly freight payable, though ship lost.

If the freight be contracted for monthly it is so payable, and becomes due from month to month, although it is made payable at the port of arrival and discharge; for that is considered only as constituting a collateral and special contract to pay what may remain due on the ship's arrival, provided it is not previously paid. Malyne mentions a case, where by the charter-party the freighter contracted to pay for the use of the ship so much every month, on her return into the river Thames; and after an absence of two years, she having been cast away near Dover, and the goods saved, the merchant refused to pay the monthly freight, because the ship had not arrived in the river Thames according to the charter-party. But it seems to have been decided that the money was due monthly, and the place named only to signify the time when the money *due* was to be paid.

[b] Hunter *v.* Prinsep, 10 East 378.

paid. It is as reasonable that the ship-owner should be paid what his ship earns, as it is that the mariner, who serves by the month, should be paid for the time he has served, which he must be, although he die before the voyage is ended[c]. Besides (as it is observed by Beawes) the freight becomes due on the delivery of the goods, and not on the bringing up of the ship to her discharging port[d]. Nor is it any defence to a claim for the freight, that the owner has made an insurance upon the ship for more than its worth, and thereby recovered of the insurers a compensation for his freight; for this does not concern the merchant, but the insurers only[e].

In a modern case, where the freight upon which the question arose by the charter-party, was not to become due until the ship had been in the defendant's employ fourteen calendar months, and the defendant pleaded that the vessel was not in his service fourteen months, but was within that time without any default in him consumed by fire, it was held that as the charter-party stipulated for the payment of freight by the month, the times fixed for its actual payment could only be considered as postponing, for the defendant's convenience, the actual payment of a sum then due to a future period, and not as creating a contingency, whether it should ever be paid at all. Each month's freight therefore was earned, and became completely due at the end of every month[f]. Another question which arose in this case was, upon a clause in the charter-party whereby it

Or burnt.

[c] Mal. 101. Mol. b. 2. c. 4. s. 12. 16. But see Cutler v. Powell, 6 T. R. 320. [d] Beawes, 138. *Ante*, 148. [e] Mal. 101. [f] Havelock v. Geddes, 10 East 567.

it was stipulated, that an allowance for extra men was to be added to the payment of freight, but the balance not to be paid until the ship's discharge or return; the defendants insisting, as the ship had not been discharged, nor had returned, the balance never became payable. But the court were of opinion, that the destruction and loss of the vessel was, within the true intent and meaning of this charter-party, a discharge of the vessel from the further prosecution of the adventure, and the employment in which she was engaged; and that upon that event, the residue of extra allowance became payable, as if the discharge had taken place by the act of the defendants themselves; and that the defendants must be understood to have discharged the vessel, when they could by no possibility any longer employ her[g].

Calculated by calendar months.

If a ship be chartered to perform a voyage at so much *per* month, the calculation is always by calendar and not lunar months. In an action on a charter-party, for the freight of a ship chartered to perform a voyage to Leghorn at a certain sum *per* month, the plaintiff claimed freight for twenty-two months, and a question arose, whether the calculation should be by lunar or calendar months. Lord Kenyon left it to the jury to say, how merchants construed such contracts, and the jury (which was a special one) declared that the calculation was always by calendar months; whereupon his lordship directed them to estimate the damages accordingly[h].

Having

[g] Havelock *v.* Geddes, 10 East 567. [h] Jolly *v.* Young, 1 Esp. 186.

Reduction freight for other goods taken in by master, wit in days of demurrage.

Having considered the different modes of affreightment, and where freight becomes due, it remains to be observed what discharges or destroys the right to freight. It is laid down by Beawes, that if a ship is freighted out and home, and after having delivered her cargo at the place agreed on, there are no goods provided for her re-lading, the master must stay the days of demurrage agreed on by the charter-party, and make his regular protest for the freighter's non-compliance, who will in that case be obliged to pay him, empty for full; though should the master not wait the time stipulated, or omit to make his protest, he will lose his freight. In case the master, on his finding no goods provided by the freighter, should determine to load some on his own account, as, salt or the like, that will not prevent his recovering his freight. For if the ship be laden only with salt by the merchant, which perhaps would not pay half the freight, yet the shipper or proprietor may at pleasure abandon the same to the master for freight, and he can demand no more by the charter-party. But if the master take in salt on his own account before the days of demurrage are expired, and by condition with his freighter he may claim freight, then the latter is to have the benefit of the salt in reduction of the freight[i]. The meaning of this passage in Beawes is not so obvious as might be desired; but it seems this, that the master is bound to wait his days of demurrage, in order to give the freighter an opportunity of loading such goods as he may be able; and therefore although the master may take goods on his own account after the expiration of those

[i] Beawes, 139.

those days, in case no cargo be provided by the freighter for the homeward voyage within that time, and in that case the master shall be entitled to the whole freight under the charter-party, without any deduction; yet if he load the goods before the days of demurrage are expired, then they go in reduction of the freight, because within that time, the freighter had a right to load the same sort of goods on his own account. It was observed in a previous page, that if the master secretly takes on board other goods than those of his freighter, beyond the burthen of the ship, by such fraudulent conduct he forfeits his right to freight[j].

For freight earned on intermediate voyage, not in original contemplation of parties.

Where a ship was refused permission by the Russian government to unload her outward cargo at St. Petersburgh to which she was bound, whereupon the master judging for the best proceeded to Stockholm, instead of returning back immediately to London, and afterwards brought a Swedish cargo from Stockholm to London; it was held, that although the proceeding directly from St. Petersburgh to London was not a condition precedent to the recovery of a sum agreed to be paid for dead freight, and the master might, under the circumstances, recover that sum; yet that the freighters were entitled to deduct from such sum, the amount of the freight received by the master on the Swedish cargo; though the voyage to Stockholm was not originally contemplated by the parties, but was undertaken on the emergency of the occasion; and therefore the underwriters were entitled to make the same deduction[k]. But the

[j] Mal. 99. Beawes, 137. *Ante*, 38. [k] Puller *v*. Staniforth, 11 East 232.

the contrary was decided in a subsequent case by the court of King's Bench, under similar circumstances, in an action on a policy of insurance, the Common Pleas having disallowed such deduction in an action on the charter-party[l], and it appearing that the underwriters had agreed with the assured, that in case they should not be able to obtain so large an allowance as the full return freight paid to the master, by reason of any demurrage or expences being allowed against the said freight, the difference should be paid by the underwriters by a further *per* centage, whether the same should be settled by arbitration or *legal decision*[m].

Abandonment in discharge of freight, what and where it happens.

The question as to the merchant's right of abandonment for freight generally arises in the case of capture, or shipwreck. It seems to be clear, as it has been observed, that the merchant cannot be compelled to accept his goods at any other than the place of their destination[n]; so that if they be not carried there, the merchant may refuse to take them, and if he do so, they may be considered as abandoned to the master. But it does not appear, that in such case the latter can keep them without the assent of the owner; as he can have no lien for freight before it is earned, which it cannot be where the voyage is not performed, as in Luke and Lyde, and Lutwidge and Grey[o]. These therefore cannot be called cases of abandonment for freight, which can only happen where the goods are carried to their destined port. If the master pays the expence of salvage, and conveys them to that port, the merchant

[l] Bell *v.* Puller, 12 East 496. [m] Puller *v.* Halliday, 12 East 494. [n] Abbot, 308. [o] *Ante*, 153, &c.

chant may be allowed his option of accepting them or not, charged with the additional expence of salvage[p]. But if the goods be brought to their port or place of destination, not subject to any such charge, though they be in a damaged state, it seems that the merchant should be bound to accept them, and pay the freight, though the damage may have been occasioned by the negligence of the ship-owner or captain, or their mariners, or servants, for which the freighter must resort to his remedy on the subsisting contract of affreightment. And the master may in some cases perhaps, be fairly considered his agent for the purpose of paying salvage, as in the case of wreck; though in cases of capture, he may not be clothed with an authority to redeem the once lost right of the original owners' property in the goods.

Abandonment cannot be of part only.

With respect to the right of abandonment for freight at the port of destination, it seems that no such right is ever exercised or claimed in this country; although Lord Mansfield, in the case of Luke and Lyde before quoted, seems to have thought it existed in the case of capture and re-capture, considering half the goods lost by the expence of salvage. In that case, his lordship is expressly reported to have said, that the merchant, under those circumstances, may abandon the whole of the goods, in case he thinks them not worth the freight. However it is certain, that he cannot make a partial abandonment. He shall be obliged to take all that are saved or none, he shall not take some and abandon the rest, and so pick and choose what he likes, tak-

ing

[p] Abbot, 308.

ing that which is not damaged and leaving that which is spoiled or damaged. If he can abandon any part of the goods, he may abandon all though they are not all lost[q]. It is clear therefore that if the freighter takes any part of the goods, freight is payable however damaged the goods may be by sea peril, or any other cause not imputable to the master or owners[r]. Nor are they in such case liable to the expence incurred by endeavouring to remove the injury occasioned by the salt water[s]. But the question is, whether the merchant is bound to accept the goods and pay freight, when the whole or any part of them is carried to their port of destination, or whether he is at liberty to refuse to accept them, and abandon or leave them to the master at a place short of that of their original destination, or even after their arrival at that place, in satisfaction of his freight, if they be damaged, or a part of them lost; as to which there is no judicial decision in our books. Different rules have been laid down, and different opinions entertained, by foreign ordinances and writers upon the subject,[t], which it will be proper here shortly to notice.

Valin's and Pothier's opinions on the subject of abandonment for freight.

Valin and Pothier differ as to the justice of allowing an abandonment against the claim of freight, in any case where the master is not in fault. The former of these authors maintains that the goods shipped are the only pledge for the freight, and consequently

[q] Luke v. Lyde, 2 Burr. 882. 1 Black. 190. S. C. Baillie v. Modigliani, Park. c. 2. p. 53. acc. [r] Lutwidge v. Grey, Dom. Proc. 22d February, 1738. Journals, p. 356. [s] Hotham v. E. I. C. Doug. 272. [t] Abbot, 301, &c.

sequently if they be lost, or so damaged as to become useless to the shippers, no freight is due for them. But Pothier, although he admits that if the goods be wholly lost and never delivered to the shippers, the condition of the contract respecting the carriage and delivery of the goods having failed, and there being nothing to abandon, the master cannot claim any thing for freight; yet according to this author, when that condition is fulfilled, and the master is wholly without fault, though the goods are damaged by an accident, for which he has not made himself responsible, it is no reason why the master should lose his freight[u]. It is impossible to fail in detecting the total fallacy of Valin's argument as applicable to the law of this country, or the principles of natural justice. With respect to the former, the goods shipped are not the only pledge for the freight, the merchant's personal responsibility being also pledged for the payment of it; which consideration alone seems sufficient to negative the right of abandonment for freight as between the owner or master and merchant, in any case, by our law; this species of right in insurance cases depending on its own peculiar grounds[v]. And with respect to its being the same to the merchant, whether the goods are wholly lost or become useless to him, without the master's fault; that proposition assumes, contrary to the fact, that the master is bound to answer for the loss in either case; besides that it completely overlooks the circumstance, that the delivery of the goods at their destined port is, as to the

[u] Tit. *Chartre-partie*, 59. [v] Baillie *v.* Modigliani, Park. c. 2. p. 70.

the master, the sole object and condition of his contract.

Distinction, where the master is in fault or not.

Foreign writers have not only differed, as to whether there should be any right of abandonment of freight, in the event of the goods becoming spoiled or damaged in the course of the voyage, but also as to the particular cases in which such right should be exercised, if at all, according to the different causes by which the damage has been occasioned. The *Guidon*[w] supposes the right of abandonment to exist, though the deterioration has proceeded from natural decay, or the diminution of price which takes place in some articles at particular seasons of the year, or by reason of an over-abundant supply of the market, or by leakage, whether it be occasioned by the insufficiency of the casks, or bad stowage, or sea peril, although the latter is admitted to be an average loss against the insurers; but the master, it is said, in either case loses his freight. And the French ordinance[x] altogether supports this doctrine. But Molloy[y] states the majority of opinions to be, that in the case of leakage without any fault in the master, he shall not lose his freight, especially as in some places he does not stow the goods, but they are stowed by particular officers appointed for the purpose[z]. And Valin observes that the French ordinance was taken from the *Guidon*, and he cites authority against it[a]. Pothier[b] contends that the ordinance is to be confined to

[w] c. 7. s. 10, 11. [x] *l.* 2. *tit.* 3. *fret. art.* 25, 6. [y] Mol. b. 2. c. 4. s. 14. [z] Clerac, on 11th art. of laws of Oleron. [a] *Consolato del mare*, c. 202. 234. [b] *Traitè de chartre partie.*

to leakage by sea peril, and opposes Valin's opinion that it also extends to leakage by the insufficiency of the casks. Mr. Abbot seems to think that Valin's interpretation of the ordinance is correct, and that the rule was probably introduced in early times to prevent dispute and litigation. He also observes that in our West India trade the freight of sugar and molasses is regulated by the weight of the casks at the port of delivery here, which is always less than at the time of shipment, and therefore the leakage necessarily falls upon the ship-owner[c].

Distinction, as to leakage of wine.

It seems from the following passage in Molloy, that there is a particular rule as to where freight is due for wine or the like, where part is lost by leakage. "If," says that author, "freight be agreed upon for 100 tons of wine, and 20 of them leak out, but there remain eight inches from the buge upwards, yet the freight is due; because from that gage, the king becomes entitled to custom. But if under eight inches, by some it is conceived to be in the election of the freighters to give the remaining quantity up to the master for freight, and the merchant is discharged. However the majority of opinions is otherwise; for if all had leaked out without fault in the master, there is no reason why the ship should lose her freight, which arises from the tonnage taken; and if the leakage was occasioned by sea peril, it perhaps may come into an average. Besides in Bourdeaux, the master does not stow the goods, but some particular officers appointed for that purpose. Perhaps a special

[c] Abbot, 304, 5.

cial contract may alter the case[d]". Beawes states the right to freight, in the event of the whole of the wine being lost by leakage, to depend upon the circumstance of there being no fraud found in the stowage on a survey from the Trinity-house[e]. And he observes that masters should take care to make their protests after a storm, as they may suffer severely by omitting it[f]. However the observations of these writers seems more applicable to the marine law, in the case of general ships, than to cases of affreightment by express contract, in which the right to freight must depend upon the language of the contract, so far as its provisions extend.

Where contract is dissolved by embargo, &c.

According to Beawes, if before the departure of the ship an embargo happen, occasioned by war, reprisals or the like, with the country to which the ship is bound, so that she cannot proceed on her voyage, the contract of affreightment shall be dissolved without damages or expence to either party, and the merchant shall pay the charges of unlading his goods; but if the restraint arises from a difference between the parties themselves, the charter-party shall then remain in force in all its points[g]. If (he says) the ports be only shut, and the vessel stopped for a time, the charter-party shall still be in force, and the master and merchant shall be reciprocally bound to wait the opening of the ports and the liberty of the ship, without any pretension for damages on either side[h]. However, the merchant may at his own charges unlade his goods,

[d] Mol. b. 2. c. 4. §. 14, which cites Boyce *v.* Cole, H. 26 & 27 Car. 2. B. R. [e] Beawes, 138. [f] *Id. notis.* [g] *Id.* 141. [h] *Id.*

goods during the shutting up of the ports, upon condition either to relade them or indemnify the master[i]. These observations may be useful in the absence of any express stipulation in the charter-party, for such events as are above alluded to; but the best and most secure way is to have such events, if in the contemplation of the parties, provided for by express clauses in the contract of affreightment, *applicable to both parties.*

What does not destroy or discharge right to freight.

With respect to the right of freight after capture and re-capture, it is laid down that if a ship in her voyage happens to be taken by an enemy, and she afterwards is re-taken by another ship in amity, and restored to her owners, and she proceeds on and completes her voyage, the contract is not determined though the capture by the enemy divested the property out of the owners; for the property of the enemy was defeazible, and the ship being recovered afterwards in battle re-vests in the owners; so the contract in point of law remains, and the entire freight becomes due, as if she had never been taken[j]. This seems not merely to be a rule of the general marine law, but one adopted by and become part of the common law of England[k]. Nor is it without the support of policy and principle, as well as authority.

Seizure and detention on entering blockaded port.

If the ship be taken in proceeding to a place where she is peremptorily ordered by the supercargo, her detention under that seizure is no discontinuance of the voyage; and the freighters, therefore, are liable to pay

[i] Beawes, 141. [j] Mol. b. 2. c. 4. s. 13. [k] Bergstrom *v.* Mills, 3 Esp. 36. *Per* Lord Eldon, C. J. acc.

pay freight for that time by virtue of the charter-party, in the same manner as if the detention of the ship had arisen from contrary winds, or an embargo. In an action on a charter-party for a voyage to any port or ports in St. Domingo and back to London, it appeared that the defendants were to pay a certain sum for freight of the ship the first eight months; and if she should be longer in completing the voyage, then at the rate of so much a ton *per* month for such further time as she should be so employed or engaged. The ship went to Port-au-Prince, where she unloaded part of her outward cargo. The supercargo, appointed by the defendants, then peremptorily ordered her to Cape Nichola Mole, which place being occupied by General Petion, was blockaded by General Christophe; and the ship was taken by one of his cruisers and carried into Port-au-Paix, where her cargo was confiscated, and she was detained several weeks; at the end of which time she was liberated, and returned to Port-au-Prince. She afterwards took in a home cargo, which she brought to London and delivered to the defendants; having been out upon the adventure about thirteen months. The only question was, whether the defendant was liable for the time the ship was detained at Port-au-Paix? The attorney-general contended, that she could not then be considered as performing her voyage, or employed or engaged by the defendant. But Lord Ellenborough held the contrary, and that the voyage was never discontinued: consequently, the freighters were answerable for the freight during the time of her detention, and the plaintiffs had a verdict for their whole demand[k].

If,

[k] Moorsom v. Greaves, 2 Camp. 627.

Taking of a bill from the consignee.

If, instead of receiving payment for the freight on delivery of the cargo according to the bill of lading, the captain is induced to take a bill of exchange from the consignee of the goods upon the freighter, and afterwards duly present it for acceptance when it is refused, the taking of such bill will not operate as payment of the freight, so as to prevent the master of the ship from recovering it upon the charter-party against the freighter, though the consignee be indebted to him in more than the amount of the freight. In debt upon a charter-party of affreightment, between the plaintiff (the master of the vessel) and the defendant (the freighter), for a voyage from London to Ancona, for non-payment of the freight according to the defendant's covenant in the charter-party, to pay to the master or his order freight at Ancona on a delivery of the cargo according to the bill of lading, the defendant pleaded payment according to the charter-party; and a verdict was taken for the plaintiff, subject to a case, stating, that the plaintiff applied to one Aquabona, as the defendant's correspondent at Ancona (and who was directed by the defendant to pay the freight, he being indebted to the defendant in more than the amount), to settle for the freight, as he, the plaintiff, wished to remit some money to his owners in England; whereupon Aquabona sent to him by his broker a bill of exchange for the sum wanted, drawn by Aquabona upon the defendant, which the plaintiff accordingly took and remitted to England. The bill, upon presentment to the defendant, was refused acceptance; and Aquabona becoming insolvent, it was not paid, he remaining in the defendant's debt. The question was, if these circumstances proved the defendant's

fendant's plea of payment? Lord Kenyon, C. J. considered it a very clear case in the plaintiff's favour. The plaintiff (he said) had carried and delivered the defendant's goods on freight to Aquabona, his correspondent at Ancona, pursuant to the bill of lading; where, he not knowing any thing of him (though the defendant did, having sent goods to him on credit), applied to him for payment, when he received a bill of exchange, which turned out to be of no value. His lordship was clearly of opinion, that it could not be considered as payment of the plaintiff's demand; but that the defendant remained liable for it on the charter-party. The rest of the court were of the same opinion, and the *postea* was accordingly ordered to be delivered to the plaintiff[1]. His lordship said, that if the fact had been, as supposed in argument by the defendant's counsel, that the consignee was always ready to pay in money, but the plaintiff had taken the bill for his own accommodation, there would have been some weight in that circumstance; but the fact appeared to be otherwise, for the case stated that the plaintiff had applied to Aquabona to settle for the freight, and money would have been of more value than a bill, either at Ancona or any other port in Italy. If indeed he had been guilty of any negligence after he had taken the bill, in not endeavouring to enforce payment of it, that might have been an answer to the action; but which did not appear to be the case. His lordship also seems to have thought that any want of caution in taking it might have had the same effect: but (as his lordship observed) the bill was drawn on the defendant himself, by the person whom he accredited, which might have

[1] Tapley v. Martens, 8 T. R. 451.

have deluded the most cautious man; it was a payment in the usual mode of dealing in the commercial world, and all that can be required of an agent is that he use common prudence: the plaintiff had been guilty of no neglect[m]. In the recent case of Shepard and De Bernales, that of Tapley and Martens was recognized and commented upon by Lord Ellenborough; who observed, that in that case, the freight was stipulated to be paid *on delivery of the cargo according to the bill of lading*, though the form of it is not set out; but it was probably in the usual form, viz. for delivery to the consignee or his assigns, *he or they paying freight*. It was certainly intended that the freight should be paid by the consignee, he being indebted to the defendant in more than the amount. Had it been the duty of the captain to have received payment of the freight before he parted with the cargo, he would have taken this bill at his peril, and he could never afterwards have resorted to the defendant upon the charter-party[n].

Delivery by captain does not prejudice owner's right.

In Johnson and Greaves, Mansfield, C. J. is reported to have said, that the master ought not to have delivered the goods but on payment of the freight, according to the bill of lading, and that it was contrary to his agreement so to do[o]; but his lordship afterwards observed, that if the consignee's agents did not pay the captain his freight, he might (although he had parted with the possession of the goods) maintain an action against them[p]. And it has since been expressly decided, that the clause "he or they paying freight for the goods" is introduced for the master's benefit only,

[m] Tapley *v.* Martens, 8 T. R. 451. [n] 13 East 571, 2. [o] 2 Taun. 357, 8. [p] *Id.* 358, 9.

only, and merely to give him the option, if he think fit, to insist upon his receiving freight abroad before he makes delivery of the goods; he has therefore a right to waive the benefit of that provision in his favour, and deliver them without first receiving payment; and he is not precluded by such delivery, from afterwards maintaining an action for the freight upon the charter-party. If he cannot get it from the consignee, he may insist on having it from the charterer[q]. In the case cited, the plaintiff declared in covenant on a charter-party, between the plaintiff (the master of the ship) and the defendant (a London merchant), whereby the plaintiff covenanted that he would proceed to Tangiers, where he was to apply to the correspondents, factors or agents of the defendants, for orders whether to deliver the cargo at that port or proceed to St. Lucar or Cadiz; and, after receiving such orders, he would make a right and true delivery to the correspondents, &c. of the defendant, agreeably to bills of lading. The defendant covenanted to receive the cargo at Tangiers, St. Lucar or Cadiz, and pay the plaintiff immediately on a right and true delivery of the cargo, in full for the freight so much *per* ton. It was averred that the plaintiff signed bills of lading, whereby it appeared that the ship was bound for Tangiers, and from thence to St. Lucar, unto Mr. John de la Piedra, or in his absence to his Catholic Majesty's consul at Tangiers, or to their assigns, *he or they paying freight*, &c. (being the same as mentioned in the charter-party); that those were the bills of lading referred to in the charter-party, and that no others were signed; that the plaintiff sailed to Tangiers, and applied

[q] Shepard *v.* De Bernales, 13 East 565.

plied to John de la Piedra, the correspondent and agent of the defendant, for orders, when he was directed by him to proceed with the cargo to Cadiz, whereby he was prevented from making delivery to any of the correspondents, &c. of the defendant at Tangiers or St. Lucar, agreeably to the bills of lading; but that he proceeded to Cadiz, and did make a right and true delivery of the cargo, agreeably to the orders and directions of one Benito de la Piedra, the agent of the defendant in that behalf, according to the charter-party. The breach assigned was in the non-payment of freight. The defendant pleaded, that the plaintiff had delivered the goods without receiving payment or security for the freight, &c. according to the bills of lading, whereby the freight, &c. by his default had been lost. To this there was a general demurrer. The first and principal question was, whether the plaintiff was warranted in delivering the cargo to the defendant's agent, without first obtaining from him the freight? and it was decided that he was, on the ground before mentioned; and that there was nothing particular in the case before the court, to warrant them in saying the contrary was intended by the parties. The charter-party imported that the delivery was to be to the *correspondents, factors or agents of the defendant:* and there was nothing in the bill of lading which implied that *the consignees* were not to be understood as comprehended within one of those descriptions." *The assign or appointee of John de la Piedra* (if there had been any person properly answering that description) would have been derivatively the agent of the defendant himself. Under the circumstances of the case, the observation, that the defendant's covenant

covenant in the charter-party was to pay *immediately* upon delivery, and that the bills of lading looked to a payment abroad, by fixing the rate of exchange, did not appear to the court to vary the case. The charter-party gave him a right to demand payment upon delivery, if he thought fit; and the bills of lading only fixed the rate of exchange, if he demanded it; but they did not imply that he must necessarily make the demand abroad, or that he might not wait for payment till his return[r].

Alteration of East India ship to carry more guns, &c.

Under the common printed form of the East India Company's charter-parties, the company are warranted in assisting and acting conjointly with his majesty's government, at their requisition, in sending their chartered ships upon a warlike expedition against the king's enemies, under the command of the king's officers. And it has been held, that a ship of that description continued under the charter-party, though alterations were ordered to be made in her upper works by the company, to enable her to carry a larger number of guns, &c. than her stipulated force; and though a king's officer assumed the command of her, and hoisted the king's broad pendant on board[s]. The court observed, that the alterations were made in order to fit the ship more conveniently for the purpose of her intended expedition; and that, as the company were authorized to employ her in warfare, they must necessarily have the power of fitting her for that purpose; and there was no distinguishing between additional works of this kind, and the mere alteration of a rope or plank

[r] Shepard v. De Bernales, 13 East 572, 3. [s] Dobree v. E. I. C. 13 East 290.

plank on board, which it could not be pretended would annul the charter-party. The same answer, they said, applied to the placing of the ship under the command of the king's officer. The company, or those in command, must necessarily exercise their discretion in this respect, in the conduct of any warlike expedition in which they were engaged[t]. In answer to an argument that it was the king's warfare, and not that of the company as holding an independent sovereignty in India, Lord Ellenborough said, that whatever distinction might be entertained in India, the court could make none between the East India company and the rest of his majesty's subjects, in respect to any assistance given by them, in warfare, to his government. The court must, therefore, consider this as much the warfare of the company as any other which they might wage. The case stated, that the ships and forces of his majesty and the company were conjointly employed on the expedition; and there was no previous letting of the ship by the company to government stated[u].

Clause of abatement of freight for ship in transport service.

With respect to the ship's ability to proceed on the service for which she is chartered, and what shall be considered an inability of the ship to proceed, within the clauses introduced into charter-parties of ships employed by the Transport Board, the following case is material to be noticed. The charter-party (which was for the hire of a ship on the transport service for twelve months) stipulated, that the vessel was to be manned in the proportion of five men and a boy to one hundred tons, and that the whole number of men should

[t] Dobree v. E. I. C. 13 East 303, 4. [u] *Id.* 301, 2.

should be constantly on board, and a regular book kept of their entries and discharges, &c. A certain sum was payable for freight for the twelve months, provided she should not be lost or captured within that time. But the defendant's plea to part of the money claimed for freight stated a clause in the charter-party, which provided that upon its being made to appear that the ship was unable to execute or proceed on the service, the commissioners should be at liberty to make such abatement out of the freight as they should adjudge reasonable; the plea then stated that by such inability the ship was detained so many days at Quebec, which appearing to the commissioners, they made an abatement of so much. The question was whether a deficiency of the crew, in consequence of sickness death and desertion, was an inability of the ship, so as to give jurisdiction to the commissioners to make an abatement; and it was held so to be, notwithstanding such inability did not arise from any fault of the master[v].

Quere, if captain can take goods freight free?

The owner fitted out a ship for a foreign port to earn freight, but the captain being prevented by an embargo from proceeding to that port, put into another, where, being unable to obtain goods on freight, he took goods on board, and having signed the usual printed bill of lading for delivery to order or assigns on being paid freight, he afterwards inserted in writing the word *franco*, to signify that the goods were to be carried *free* of freight. On arrival, the goods were unloaded by the owner of the ship, and offered to be delivered upon payment of freight, which was refused.

[v] Beatson v. Schank, 3 East 233.

refused[w]. The shipper declared against the owner and master of the vessel for non-delivery, stating that he had, at their request, put the goods on board, to be carried freight free; with a count in trover. He obtained a verdict; and a rule having been obtained to set it aside, it was argued in support of the verdict, that the captain being a stranger to the Swedish language, the word *franco* had been fraudulently added without his knowing its import[x]. If that had been so, to be sure there could be no doubt but that such fraudulent conduct could not have prejudiced his right to freight; but there does not seem to have been any ground for that suggestion, which was accordingly disregarded. They then compared the case to that where the borrower of money gave the lender a note promising *not* to pay it, which was held a promise to pay[y]. They also contended, that the owner of the ship, not being privy to the captain's agreement, was not bound by it, being beyond the scope of his authority as captain, or the usual employment of the ship. They observed, that not even the usual exception of sea peril was contained in the bill of lading; that the contract was without consideration; and the objections equally applied to the count on the special contract as that in trover, as the owner of the ship had a lien upon the goods for the freight. On the contrary it was argued in support of the rule, that the practice of contracting to carry goods freight free, (that in case the consignee do not receive and pay for them, the consignor may have them back at the invoice price at the port of delivery,) was very frequent

[w] Dewell *v.* Moxon, 1 Taun. 391. [x] *Id.* 392. [y] 2 Atk. 32.

quent in trade; and that there was no fraud in the case. That it would have been useless to insert an exception against sea peril, as the owner was not responsible to the shipper, the goods being carried gratuitously. But that being the case, no contract could be implied to pay freight to the owner, though he might perhaps have annulled the contract before the sailing of the ship. That the captain of a ship is a general agent, and has the most general powers; but that if he had abused them he was liable to his owner for the abuse. That the captain may think it prudent to take goods freight free instead of ballast, where he can get no goods on freight. Besides, the lading of the goods on board the ship might be detrimental to the owner of the goods, and therefore constituted a sufficient consideration for the contract; and that if the right to freight could not be supported, trover might be maintained. The court seem to have been inclined to support the action, but to have very much waivered in opinion upon the question of law; which is one reason why the substance of the arguments on both sides is stated, if the novelty of the case and ingenuity of the arguments were not of themselves sufficient reasons for their being stated. Mansfield, C. J. observed, that the word "*franco*" was especially inserted, and it was very difficult to attribute any other meaning to the word than that the goods should go free of freight. But the question was, whether the plaintiff having obtained the use of the owner's ship without his consent, the owner was not entitled to a *quantum meruit* for freight. There was no consideration for the bill of lading; the deals were not consigned to the owner of the ship. Lawrence, J. observed, that in the case of policies, the words "on goods," or "on ship," are inserted

inserted in writing, although the printed form is otherwise. But as to the extent of the captain's authority, (he said) suppose a butcher's servant should give away his master's mutton to persons who dress and eat it, would not the butcher be entitled to payment? The court were unanimous that trover was sustainable. However upon the point of the captain's authority to carry goods freight free, the judges took time for consideration; and afterwards they declared themselves of opinion, that the circumstances of the case did not sufficiently appear to enable them to form a conclusive judgment upon it; and they directed that the name of the master of the ship should be struck out of the record; and made the rule absolute for a new trial[z].

Advance money cannot be recovered back.

Although if a ship be lost before it comes to a delivering port, no freight or wages is due; yet if advance money be paid before-hand, and named so in the charter-party, although the ship be lost before it comes to a delivering port, yet the freighters cannot have back their money; and as it is a general rule that freight is the mother of wages, and wheresoever freight is due wages are also, for this reason in the case supposed wages are likewise due, according to the proportion of the freight paid before-hand[a].

[z] 1 Taun. 396. [a] Anon. 2 Show. 283. Beale *v.* Thompson, 3 B. & P. 424, *per* Rooke, J. acc.

CHAPTER

CHAPTER IX.

OF PRIMAGE AND AVERAGE; PILOTAGE AND PORT-CHARGES: ALSO OF PASSAGE MONEY; AND THE PENALTY, IN THE CHARTER-PARTY.

IN this short chapter, the topics which are mentioned in the title of it are intended to be touched upon; but of the four first of them, little else will be found than a description of the nature of those charges, the books not furnishing any particular information respecting them; and the law relating to pilots, has already been fully and accurately stated by Mr. Abbot. Passage-money is sometimes, though not generally, provided for by the charter-party. Some observations are therefore made as to where it is due, and where the right to it is destroyed or suspended. Upon the subject of the penalty in the charter-party, it is considered, first, where it is or is not recoverable as liquidated damages, and where damages are recoverable beyond it at law; secondly, the relief which may be obtained against it in equity; and, lastly, the remedy (if any) against the ship or goods, in consequence of the clause

Topics of this chapter

clause in the charter-party binding them in a penal sum to the performance of the covenants.

Primage and average.

There is sometimes a stipulation in the charter-party (and still more frequently in the bill of lading) for delivery of the goods upon payment of the freight, with *primage and average* accustomed. The word "primage" is said to denote a small payment to the master for his care and trouble with respect to the goods, which he is to receive to his own use, unless he has otherwise agreed with his owners. This payment appears to be of very ancient date, and is variously regulated in different voyages and trades. It is sometimes called the master's *hat-money*. The word average, in this place, is said to signify several petty charges, which are to be borne partly by the ship and partly by the cargo, such as the expence of towing, beaconage, &c. Primage and average are often commuted for a specific sum, or a certain per centage on the freight[a]. By the laws of Wisby, it is declared that the *mariners* are bound to preserve and take care of the goods, at the request of the merchant, master and pilot[b]. A certain sum is thereby allowed for stirring the corn on board the ship; and it is declared that if the mariners fail to stir it properly, by which it becomes damaged, they shall be bound to make it good according to the judgment of the master and pilot[c]. But by the common law, the duty of taking care of the goods whilst on board the ship certainly devolves on the master, and the mariners are bound to obey his orders chiefly with regard to the navigation of the vessel. The hat-money or

[a] Abbot, 282, 3. [b] Leg. Wis. 47. [c] *Id.* 48.

or *gratification-money*, as it is sometimes called, is now always made payable to the master; and perhaps was so called from having been formerly collected in a hat, as a gratuitous reward from the merchants; (who used, perhaps, to sail with their own goods,) for the civility and attention shewed them by the captain whilst on board. But in modern times, from the extension of trade, merchants have their correspondents and agents at foreign ports, and appoint persons to superintend and take care of the goods on board the ship, called supercargoes, where that is necessary.

It is obvious, that pilotage signifies that reward which is payable to a person employed to pilot the ship. A pilot taken on board for the whole voyage is called the ship's pilot, as contradistinguished from a pilot of a particular port or country. Frequently, but not always, this charge of pilotage is provided for, as to amount and how it is to be borne, by an express clause in the charter-party; and where that is not the case, the usage of merchants in similar voyages, will be ground for presuming or implying a contract to conform to that usage. According to the laws of Wisby and Oleron, if there be occasion for a pilot of the country, and the merchant refuse to give his consent to it, the master may yet hire one, if the ship pilot and the major part of the mariners think fit; and his pay shall be at a reasonable rate upon account of the ship and lading[d], or the master shall find him victuals, and the merchant his pay[e]. By those laws, if a pilot undertake the conduct of a ship to bring her to any given port, but fail in his undertaking, and the Pilotage.

[d] Leg. Wis. 44. 59. [e] *Id.* 60.

the ship miscarry by his want of skill, he shall make the loss good; and if he be not able to make satisfaction, for it, and (to use the language of those laws) the master, or any of the mariners, or merchants, cut off his head, they shall not be accountable for it! although (it is gravely provided) before they do this, they ought to know whether he has wherewith to make satisfaction[f].

Port-charges.

Port-charges are those payable on the ship's clearing out of, or entering into port. We have seen, that it is the duty of the master to obtain the necessary clearances from the officers of the customs, or other proper persons, whose duty it is to give the discharge of the vessel, and pay the necessary port and other charges due on the occasion[g], in order that he may be enabled to commence his voyage without delay, when the wind and weather shall be favourable[h].

No apportionment of pilotage, &c. for an entire voyage.

Upon an agreement to pay certain pilotage and port-charges for an entire voyage, though a part only of the cargo is delivered, there shall be no apportionment of the pilotage and port-charges, but the whole shall be paid: therefore where there was an acceptance of part of the goods by the consignees in the course of the voyage, the whole of the pilotage and port-charges was allowed; the reason is, that the amount of them would have been the same for that part of the cargo which was delivered, as if the whole had been delivered[i].

Passage-money, what.

Passage-money is the payment to be made for the carriage of passengers or supercargoes on board the ship. This is also frequently provided for by the charter-party,

[f] Leg. Ol. 23. [g] *Ante*, 34. [h] *Ante*, 40. 53. [i] Christy *v.* Row, 1 Taun. 316.

ter-party, and in the absence of any express provision must be governed by usage. On this subject where no provision has been made, some curious questions have arisen, as, whether the master of a ship, having undertaken to carry a family, or certain slaves, or cattle, some of which die in the voyage, shall have any and what freight for those persons or cattle.

Where due in particular cases.

Four particular cases of this sort are put, and resolved by the books: first, it is said, that if the contract be made for the whole family, slaves, or cattle, the whole passage-money is due; 2dly, if it be covenanted that for every head or passenger the master shall have a certain sum, then for such as die and never arrive at the destined place there is nothing due; 3dly, if it do not appear how the contract was made, but there is a certain sum agreed upon, then the agreement being entire, the whole sum is to be paid although some die[j]; but if the freight be contracted for the *transporting* of them, and death happens, then freight is only due for such as are living at the port of discharge[k]; 4thly, if a woman be delivered of a child in the voyage, yet there is nothing to be paid for the passage of the child[l]. It has also been made a question, whether if the master of a ship promise to place another in his ship, and land him in a certain place, he can demand any recompence for the same, he never having placed the party in the ship, but the party of himself coming into the vessel; as to which it has been considered, that there is a distinction between living

[j] Mal. 100. Mol. b. 2. c. 4. s. 3. [k] Mol. *ubi supra*. [l] Mal. 100, 1. Mol. *ubi supra*.

living and rational creatures, and dead and insensible things[m]. It is said, that if the ship or passengers be not ready by the appointed day of sailing, and there be no just cause of excuse, as, the state of the wind, &c. either party may discharge or rescind the contract; for otherwise the proper season for the passage may be lost[n].

Passage-money payable by East India Company, though the ship lost before arrival.

The sum covenanted to be paid by the East India Company's charter-parties to the ship-owner in England, for each passenger *ordered on board* the ship in India by the company's agents, is payable notwithstanding the loss of the ship before her arrival in the Thames[o]; for an extra expence is incurred by the owners laying in a stock, for the necessary subsistence of the persons ordered on board by the company's agents, which expence is incurred whether the ship arrive or not. Nor is such charge repelled by the stipulation in the charter-party, that "if the ship do not arrive in safety in the Thames, the company shall not be liable for freight and demurrage, or for any demands in respect of the ship's earnings in freight voyages for the company, or on account of any other employment;" for construing the latter words according to the context, they mean the employment of the ship in any other voyage or adventure; and the putting of the passengers on board does not alter the destination of the ship[p].

By usage, though deed seemingly to the contrary.

The following is a strong case to prove the rule, that the construction of charter-parties shall be conformable

m Mal. 101. Mol. *ubi supra.* n Mol. b. 2. c. 4. s. 3. *Sed vide ante*, 51. o Moffat v. the East India Company, 10 East 468. p *Id.*

formable to the usage of trade. At the trial before Lord Kenyon of an action on a charter-party under seal, by which it was stipulated that the merchant should have the use of the ship outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers; the defendants insisted that under a charter-party so worded, it was the constant usage of trade to allow the master to take out a few articles for private trade; and his lordship suffered evidence to be given to prove this usage, observing, that although *primâ facie* the deed excluded this privilege, yet he thought that it might be explained by uniform and constant usage, that constituting a tacit exception in the contract, and upon the evidence his lordship thought the usage was proved. Eleven of the jurymen wished to find a verdict accordingly; but the twelfth insisting that he could not conform to the general opinion, on account of the positive words of the contract, a juror was withdrawn by consent, and no verdict pronounced in the cause[q].

It has been held, that if passage-money be reserved at the rate of so much *per* man it shall be recoverable for the number of men carried, though less than that covenanted to be provided and carried. The plaintiff covenanted to go with a ship to D. in Ireland, and there to take in two hundred and eighty men from the defendant, and carry them to Jamaica, and the defendant covenanted to have the two hundred and eighty men there ready, and to pay for the carriage of them £5 a man. The plaintiff declared in covenant on this contract,

Passage-money recoverable, for less than the stipulated number of men.

[q] Donaldson *v.* Foster, M. 29 G. 3. Abbot, 222. And see Anderson *v.* Pitcher, 2 B. & P. 164, and 2 Ves. 331, ther cited.

contract, and stated that the defendant had not the two hundred and eighty men ready, but that he had one hundred and eighty only; which were taken and carried to Jamaica; but the defendant had not paid for them. The defendant pleaded that he had the two hundred and eighty men ready, and tendered them to the plaintiff, but that he would not receive them; without saying any thing to the carrying of one hundred and eighty men, or to the non-payment for them. And it was held no sufficient plea to the declaration, but only in reduction of the amount of the passage-money to be received, and judgment was accordingly given for the plaintiff, upon a demurrer[r].

Capture and suit in admiralty court, suspends right to passage-money.

Whether the right to recover passage-money be destroyed by capture or not, it is clearly suspended, during process against the ship in the admiralty court. The plaintiff contracted to carry the defendant, his family and luggage, from Demerara to Flushing; in the course of the voyage within four days sail of Flushing, the vessel was captured by an English ship of war and brought into England, and the vessel and cargo were libelled for prize in the court of admiralty, and the cargo condemned; but whilst the proceedings were still pending against the ship, the defendant and his family were liberated, and their luggage restored to their possession. And it was held, that however the question might be as to the plaintiff's right to recover passage-money upon an implied *assumpsit pro ratâ itineris*, if the ship had been restored, yet pending the proceedings against the ship as prize in the admiralty court, no such action could be maintained; for *non constat* but that the ship might be

[r] Thompson *v.* Noel, 1 Lev. 16. *Ante*, 89.

be condemned, and its earnings decreed to the captors, in which case clearly the plaintiff could not recover. The restoration of the luggage by an unauthorized hand could not vary the question[s].

Penal sum, where recoverable as liquidated damages.

With respect to the penal clause in the charter-party, Malyne recommends, that a considerable sum of money should be made payable on either side in case of non-performance, and that a covenant be inserted in the charter-party, whereby payment may be enforced[t]. But it is clear, that if the word "penalty," or the like expression, be used in the instrument, that will effectually prevent the sum mentioned from being considered as liquidated damages[u]. It is very difficult to lay down any general rule, for ascertaining where a sum mentioned to be paid in the event of the non-performance of an agreement shall be considered a penalty, or as liquidated damages. However it may be safely stated as a general rule, that where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty; though where it is agreed that if a party do such a particular thing a certain sum shall be paid by him, that sum may be treated as liquidated damages[v], especially if lesser sums of different amounts are first made payable by the contract. The reason is that in the former case, it would be unreasonable to suppose that the same sum was intended to be recoverable as a penalty or otherwise, in the event of the non-performance of

[s] Mulloy v. Backer, 5 East 316. [t] Mal. 102. [u] Smith v. Dickenson, 3 B. & P. 632. [v] Astley v. Weldon, per Heath, J. 2 B. & P. 353.

of different stipulations for different acts, the non-performance of each of which must occasion a different amount of damage or injury; though there is nothing unreasonable in stipulating for the payment of a certain sum in the event of the non-performance of one single covenant, for the performance of one individual act.

Where expressly agreed to be recoverable.

It may be questionable where, as is now very common in many agreements, it is expressly stipulated that the sum at the end of the contract shall be recoverable in the event of any breach, whether the party can recover that sum as stipulated damages, without regard to the real loss he has sustained. In such case the distinction seems to be, that if it is merely expressed that the party shall *recover* the sum mentioned, then that will be satisfied by his obtaining *judgment* for it at law, however it may be in equity; but if it be expressly mentioned that it shall be recoverable *and receivable* either at law or in equity "as liquidated damages," then there seems no reason why execution should not go for it at law, whatever controul equity may have over the contract; for the statute 8 & 9 *W.* 3. c. 11. s. 8. only speaks of actions for *penal sums*, though it appears to have been considered as extended to all actions upon any covenants or agreements by which such sums have been reserved, whether under seal or not, as, covenant, debt, or *assumpsit*[w]. However the question is at present merely speculative, no judicial decision having passed upon it.

Damages recoverable beyond the penalty, at law.

Where there is a penalty in a charter-party for the non-performance of the covenants, the plaintiff may either

[w] 13 East 346.

either sue for the penalty and rescind the contract, or declare upon the covenants and affirm the existence of the contract. In the latter case, the plaintiff may recover more than the amount of the penalty in damages at law[x]; and if he proceed upon the covenants he may recover more than the penalty, *toties quoties*, so often as he sustains damages by any subsequent breach of them[y]. But if upon the first breach he proceed at once for the penalty, he cannot recover beyond that amount; and having once chosen to sue for the penalty, he cannot resort back to the covenants for general damages, though he may be satisfied for the damage actually sustained out of the penalty, and that will then remain as security for future breaches. The penalty therefore in such case is auxiliary to the covenants for performance, though the advantage of taking judgment for it as the debt at law is very much abridged by the statute 8 & 9 *W.* 3. c. 11. s. 8. Upon these principles in a modern case, where an action was brought against the ship-owner upon a charter-party of affreightment, whereby the defendant agreed to proceed with all convenient speed to a foreign port, and there load within twenty running days a cargo from the plaintiff's factors, and therewith return home and in fifteen running days deliver the same on payment of the usual freight, concluding with a certain penalty for non-performance: it was held, that the plaintiff might recover damages for the breach of the contract, in the defendant's not permitting the vessel to proceed on the voyage, beyond the amount

[x] Winter *v.* Trimmer, 1 Blac. 395. [y] *Per* Lord Mansfield, 4 Burr. 2228.

amount of the penalty[a]. It appears that there may be a difference where the penalty is contained in the same clause with the covenant to do the act covenanted to be done, in which case there seems to be more reason for limiting the parties' responsibility to the sum stated; but it is impossible so to limit it when the penalty is not referable to any particular clause, but to the whole agreement, and the plaintiff's demand upon one of the covenants upon which he sues exceeds the whole penalty[a].

Against ship, or goods.

Beawes has this passage: "As the goods are responsible to the captain or owner of the ship for the hire, so is the ship to the owner of the goods, in case of damage or waste through any defect of the vessel or sailors[b]." But it is observed by Mr. Abbot, that although the ship and freight are, by the terms of a charter-party, expressed to be bound to the performance of the covenants on the part of the owners or master, and this is conformable to the maritime law; yet there does not appear to be at present, any mode of obtaining in this country the benefit of the security of the ship itself in specie, for the performance of such a contract made here[c]. The right of lien which the owner or master of the ship has upon the goods for the payment of the freight, &c. will be considered in the next chapter.

Power of factor to bind the goods.

It is observed by Mr. Payley, in his valuable treatise on the Law of Principal and Agent, that a factor, whose employment

[a] Harrison v. Wright, 13 East 343. [a] *Id.* 346, 7. [b] Beawes, 133. [c] Abbot, 191.

employment requires him to transmit goods to his principal in a foreign country, has power to bind those goods for the freight; the rule as stated by Molloy being, that if a factor enter into a charter-party of affreightment with the master of a ship the contract binds him, though if he lades the goods generally, the principals and the lading are liable, and not the factor, for the freight; yet if a merchant allows a certain sum to the factor for carriage, and the factor on his own account executes a charter-party for the hire of a ship, the merchant or the goods are only liable for the freight to the extent of the sum allowed for carriage, and not for the whole hire of the ship[d].

[d] Payley, 157, which cites 2 Mol. 331. 2 Atk. 622.

CHAPTER X.



OF THE REMEDY UPON THE CHARTER-PARTY, AT LAW.

Division of chapter.

IN considering the different remedies which either party has upon instruments of this nature at law, it will first be proper shortly to advert to those which the master or owners are subject to, for not fitting the ship, &c. and then to state such as he or they may pursue against the freighter or merchant, for the recovery of freight, &c. by lien on the goods, or by action on the charter-party of affreightment; the latter of which appears to be the only remedy open to the freighter against the captain, or owners of the ship, the common law not giving to him any lien, or remedy against the ship itself[a]. In treating of the remedy which is given against the freighter or merchant by action at law, it will be proper to consider first, the form of the action, and then the parties to it; which, with the other topics above suggested, are proposed to form the subject of the present chapter.

If

[a] *Ante*, 98.

Remedy against the master or owners, for not fitting the ship, &c.

If it be stipulated by the charter-party that the ship shall be made tight, &c. and so kept during the voyage, or for a limited time, and in consequence of her not being fitted as required by the charter-party, she is prevented from proceeding on her voyage, or delayed in the course of it, and any damage or expence be thereby incurred, the freighter cannot repudiate the contract on this account, after he has once taken the ship into his service, and employed her. In general, the making of the ship tight, &c. will not be considered as a condition precedent to the plaintiff's right to freight, inasmuch as it does not go to the whole consideration of the contract; nor can any thing be deducted from the freight on that account, unless there be an express stipulation in the charter-party for such deduction. But if the whole consideration or object of the contract be defeated by not fitting the ship by a given time, the freighter may it seems in such case immediately discharge the ship; and if there be a clause in the charter-party, as there sometimes is, giving him a power to deduct a given sum from the freight, he may make the deduction and pay himself out of it accordingly. In all cases, he may bring his action against the master or owners of the ship, or other person who has bound himself by the charter-party on their account, and recover such damages as he may have sustained by the defendant's neglect[b]. In like manner, the master or owners of the ship, &c. will be answerable, if the stipulations in the charter-party be not complied with as to the furniture of the ship, or her crew, or provisions,

[b] Havelock v. Geddes, 10 East 555. *Et vide ante*, 21.

provisions, by which any damage happens to the freighter[c].

Not properly loading, or stowing the goods, &c.

So, if the master or owner refuses to receive on board a proper cargo[d], where there is no sufficient reason for his refusal[e]; or be guilty of negligence or improper conduct in taking the goods on board, or the stowage of them[f]; or he over-loads the ship with the goods of the freighter, or *a fortiori* of any other persons[g], the proper remedy against him or his owners for so doing, is by action on the charter-party for damages; which is also the proper and perhaps the only remedy, in case of the ship's not sailing in time[h], or with convoy as stipulated[i], or to her proper port[j], or not making a right and true delivery of the goods agreeable to the charter-party[k]; the consequences of which several events have already been sufficiently considered.

Lien on goods, for freight.

The lading of the ship, in construction of law, is tacitly bound for the freight; which is, in point of payment, preferred to any other debts to which the goods are liable[l], though such debts, as to time, were contracted precedently to the freight; for the goods remain, as it were, bailed or pledged as a security for the freight. Nor can they be attached in the master's

[c] *Ante*, 26, &c. [d] *Ante*, 35. [e] *Ante*. [f] *Ante*, 37. [g] *Ante*, 37, &c. [h] *Ante*, 51, 2. [i] *Ante*, 48. [j] *Ante*, 54, &c. [k] *Ante*, 118. 69. 93, &c. [l] Beawes, 133.

ter's hands[m]. The goods carried, generally, are a security for the freight; and the master need not deliver them without payment[n]. But by special contract, this right may be dispensed with; and if the goods be once delivered, the right is gone; nor can it afterwards be revived, though the master again get possession of the goods[o]. It seems however that a captain does not lose his lien for the freight by the delivery of the goods into the king's warehouse, in compliance with the requisitions of an act of parliament, and where they are still disposable according to the just claims of all parties[p]. And in a late case, Lord Ellenborough observed, that delivery of goods into the warehouses at the West India Docks, under the requisitions of the West India Dock acts, is not to be considered as an actual delivery, so as to put an end to the captain's lien on the goods for his freight; which lien (his lordship observed) would have been preserved for him by the common law, without the special provisions of the above acts for the purpose[q]. But by the modern decisions, although the captain loses his lien for the freight by delivering the goods to the consignee or his agent, yet he is not left to his remedy against the former, unless not only the bill of lading but the delivery be also made to him; for if the goods are delivered to a third person, whether by mistake or otherwise, his receiving them from the master, and the master's parting with his lien, is held evidence

[m] Mol. b. 2. c. 4. s. 12. [n] Com. Dig. tit. Merchant, E. 3. [o] Sweet *v.* Pym, 1 East 4. [p] Ward *v.* Felton, *Id.* 512. [q] *Per* Lord Ellenborough, Wilson *v.* Kymer, M. 53 *G.* 3. K. B.

evidence of a new contract to pay the freight, by the person to whom the goods are delivered[r].

Merchants' goods not bound by factors' charter-party.

It is said to be one thing to be a *cape* merchant, another to be an under-freighter[s]. The *cape* merchant appears to be the factor, or person who *takes* the ship originally on hire from the master or owners; the under-freighter him to whom the ship is let to freight by the factor. The remedies against these for the freight are very different: the former alone is answerable upon the original contract to the master or owners, for the sum originally agreed upon; and the latter is liable to the merchant only for the sum at which the whole or part of the ship is let to him. Nor will equity extend this liability. Where two persons, who afterwards became bankrupts, hired a ship of the plaintiff at £48 a month, and executed a charter-party accordingly, *whereby the goods to be put on board were made liable to him for the freight*; and some merchants loaded the ship, and allowed the bankrupts as their factors £9 *per* ton for the carriage; the plaintiff insisted that as the bankrupts were not able to satisfy him the whole hire of the ship, the merchants were liable to do so, in respect of their goods which were bound by the charter-party. But the Lord Chancellor held, that although the cargo was liable under the general law of merchants, yet that the bankrupts could not of themselves, by virtue of the charter-party, bind the goods of the merchants to answer the freight[t]. As to the general law, the

cargo

[r] 6 Esp. 22. 13 East 399. [s] Mol. b. 2. c. 4. s. 1. [t] Paul *v.* Birch. 2 Atk. 621.

cargo was, no doubt, liable to pay the freight and other expences of carrying the goods. But the £48 a month was rather for the hire of the ship than the freight, the factors being at liberty to put in what the master pleased, and also the mariners; the factors therefore contracted for the hire of the ship, and the merchants only for the freight of the goods. The merchants were no doubt liable to pay the freight; but it would have been very hard to make their goods liable by the engagement of the factors, made on their own account and not on the part of the merchants. The bankruptcy did not alter the case; for it has been held that where a factor becomes bankrupt, if the merchants' goods are not mixed with his own, they shall go to the merchants. And although the merchants be indebted to the factors, and the plaintiff stands in place of the factors, yet there is no lien for a debt, unless it be custom or usage. A person who lets out his ship to hire ought therefore to take care that the hirer is a substantial man, and sufficient to make good the hire; for if the persons who hire are not competent, the master must suffer for his neglect[u].

Whatever may be the rule of foreign laws on the subject, in this country it has been held that the master may detain any part of the merchandize, for the freight of all that is consigned to the same person[v]. But Mr. Abbot says, the master cannot detain the goods *on board the ship* until the freight is paid,

How right of lien may be exercised.

[u] Paul *v.* Birch, 2 Atk. 621. [v] Soldergreen *v.* Flight, T. 1796, *coram* Lord Kenyon, Abbot, 258.

paid, as the merchant would then have no opportunity of examining their condition [w]. And he observes, that the practice is to send such goods as are not required to be landed at any particular dock, to a public wharf with an order to the wharfinger, not to part with them till the freight and other charges are paid, if the master is doubtful of the payment [x]. However I do not find any authority to compel the master to deliver the goods from out of the ship without payment of the freight; and as to giving an opportunity for examination, that may be done on board the ship, or on their delivery out of it. Besides, the freighter or merchant may seek his remedy on the charter-party, if they be not delivered in good condition [y]. Where by the regulations of the revenue or the dock acts, the goods are to be landed and warehoused until the duties are paid, the master should enter them in his own name in order to preserve his lien.

Tender of charges, not necessary against wrong-doer.

It has been held that if goods be delivered to a person claiming them wrongfully, and he pays the freight and other charges, they cannot be detained by such person for those expences, against the real owner [z]. Therefore there is no necessity in such case, to tender the amount of them; and if the goods themselves are claimed, and not merely a lien for the expences, it would in that case be nugatory to make such tender. In Lempriere and Pasley,, the possession of the party who advanced the freight, &c. was upon equitable principles, held to be legalized by an assignment

[w] Abbot, *ubi supra*. [x] *Id.* 259. [y] *Ante*, 69. 93, &c. [z] Lempriere v. Pasley, 2 T. R. 485.

ment of the goods at sea as a collateral security for a debt, although before the indorsement of the bill of lading took place, the assignor became bankrupt[a].

Lien for passage money.

The master of a ship has certainly no right to detain the passenger himself, or the cloathes which he is actually wearing when he is about to leave the vessel; but he has a lien on any other property the passenger may have on board. He has a lien upon the luggage, for the sum agreed to be given for the carriage of the passenger and luggage. In detaining that, there is no greater inconvenience than in the common case of the detention of goods carried on freight; and there is no reason why there should not be the same lien for the recovery of passage money, as for the recovery of freight. Trover was brought for a trunk of wearing apparel and a writing desk, which the plaintiff had brought with him from the Brazils to England, in a ship of which the defendant was master. The plaintiff himself had come on shore at the first port the ship made in the channel, and travelled to London by land. The articles in question, which were part of his luggage, he had left behind him to come round with the ship. When she arrived in the river, he sent to demand them; but the defendant refused to deliver them until he should be paid £15, saying, that the plaintiff was to pay £30 for his passage, &c. and had then paid only half that sum; which was proved to be a reasonable sum for his passage. Lawrence, J. who tried the cause, was of opinion that this refusal was no tortious conversion. He said, the defendant had a right

[a] Lempriere v. Pasley, 2 T. R. 485.

a right to say to the plaintiff "You shall not have "your things, until you pay me what is due for "bringing them and you from Brazil:" the defendant accordingly had a verdict[b]. I do not find that where there is a right of lien, as, for freight or passage money, it makes any difference whether a specific sum be expressly contracted to be paid on either of those accounts, or the plaintiff sues on a *quantum meruit.* It seems to be the nature of the charge, and not the ascertainment of its amount by the contract, which gives the right of lien. Indeed, where the certainty of it is capable of being ascertained, by computation or evidence of usage, the rule applies, *id certum est, quod certum reddi potest.*

For dead freight, or demurrage, &c.

There is no right of lien for dead freight, or demurrage, which sound in damages merely[c]; nor for any other breach of covenant on the part of the freighter, which gives the master or owners a right to unsettled damages. Nor can such right be resorted to, to enforce the payment of the penalty in the charter-party. In the case which was decided against the right of lien for dead freight or demurrage, it appears that the charter-party did not contain the usual penal clause binding the goods to the performance of the freighters' covenants; but no reliance was, or could be placed on that circumstance. In reason however, where the demand is on account of the use and hire of the ship, by keeping her with the goods on board, (especially where a certain sum is due on

[b] Wolff v. Summers, 2 Camp. 631. [c] Philips v. Rhodie, E. 52 G. 3. K. B. *Ante*, 117.

on that account) there does not appear to be any solid distinction between freight and demurrage, as to the right of lien; either being equally a debt due to the master or owners of the ship, in respect of the use of the vessel or the carriage of the goods; though dead freight is rather a compensation for not using or employing the ship, according to the contract of affreightment.

Form of action on sealed charter-party.

We next come to consider the remedy on a charter-party of affreightment by action at law. The nature of the remedy or proper form of action at law upon a charter-party of affreightment, depends in a great measure upon whether the charter-party be under seal or not; if it be under seal, and the plaintiff proceed for the penalty, he may either declare in an action of debt or covenant. In the former action, he may also join any other demand of a liquidated nature, which may be due to him by specialty or otherwise; which is a considerable advantage attending this form of action, where there is any difficulty in proving the sealed instrument, on account of the absence of the subscribing witness, or loss of the instrument itself, or where there has been any new agreement by parol extending or altering the terms of the original contract by seal[d]. The action of debt however can only be made use of where the plaintiff's demand is of a liquidated

[d] White v. Parkin, 12 East 578.

liquidated nature for a certain sum, and does not consist of an unliquidated claim to general damages, which requires to be ascertained by a jury. This form of action, therefore, can in general only be used where the contract has been wholly or partially carried into execution, by earning the freight or the like, unless the party proceeds to indemnify himself against such general damages as he may have sustained, out of the penalty in the charter-party. On the other hand, the action of covenant may be brought whenever the charter-party is under seal, whether it contain a penal clause or not, and whether the plaintiff's demand be of a liquidated nature for a certain sum due, or for general damages merely; but this action can only be maintained upon sealed instruments, so that the plaintiff cannot include in his declaration any general *indebitatus* counts.

On charter-party not under seal.

If the charter-party be not under seal, with respect to the remedy or form of action upon it, there is no difference whether it be by written or verbal contract; for the party may in either instance declare upon it in an action upon the case founded upon the assumpsit or undertaking, the breach of which he complains. And in this action, as in covenant, the plaintiff may declare for the breach of any stipulation entitling him to general damages, or for a certain sum due, or for both in different counts of his declaration, as is very commonly done in practice. And though there be no express contract at all entered into between the parties, but the defendant is charged upon his receipt of the goods, the plaintiff may declare in this action upon the implied contract raised by operation at law, under the circumstances of his case. In this action as in debt

too,

too, the plaintiff may in the same declaration include as many simple contract claims for sums due, of whatever different natures, as he pleases. It seems once to have been made a question whether *indebitatus assumpsit* could be maintained for freight; a writ of error was brought on the ground that it did not appear how the defendant became indebted; and it was urged that as freight was usually contracted for by charter-party under seal, it must be so intended, in which case this was not the proper remedy. But the judgment was affirmed; because it did not appear that there was any deed in the case, and it was held that none could be intended[e].

Parties to the action, in general.

In suing upon contracts by charter-party, or for freight, &c. all the persons with whom the contract is made, and who are jointly interested in it or the damages to be recovered for its non-performance, must join in the action; for otherwise the plaintiff is liable to be nonsuited at the trial, if it then appear that the contract was made with other parties than those who are joined; though it is said that the claim of part-owners of a ship for freight is joint or several, at their election[f]. On the other hand, all the parties who are joint-contractors, and jointly liable to be sued upon the contract, must be made co-defendants; for otherwise it may be pleaded in abatement that there are other joint-contractors not sued, and then the plaintiff will have to drop his action and commence another against all the persons liable; though if the defendant omit to plead in abatement within the proper time, as it

[e] Prior v. Shears, 1 Vent. 100. [f] Stanley v. Ayles, 2 Keb. 444.

it is matter peculiarly within his knowledge who were joint-contractors with him, he cannot take advantage of being sued alone by any objection at the trial, to nonsuit the plaintiff. The action must always be brought by, and against, the principal parties to the contract, and not such persons as may contract merely as the agents of others; for in construction of law, the contract of an agent, lawfully authorized, is the contract of his principal; unless indeed he contract in his own name merely, and not as agent, in which case he will, like any other man, be himself liable for the non-performance of his contract. If the contract be under seal, it is immaterial whether there be any consideration for it or not; nor can the sufficiency of the consideration be inquired into, although the legality of it may, in all cases. But if the contract be not under seal, there must be a good and sufficient consideration to support it. And if it be to answer for the debt or default of another person, it not only must be in writing, and signed by the party liable, but the consideration must also be in writing, by the statute of frauds, as constituting part of the agreement[g]. A servant of government contracting by deed on account of government, is not personally liable[h]. Molloy observes, that if a merchant enter into a contract for freight with a mariner, who is not master, and a loss happens, he has no remedy against the owners, but against the mariner only, upon the contract of affreightment. However, if the mariner be hired or put on board the ship by the master or owners, perhaps they may be liable[i].

The

[g] Wain v. Walters, 5 East 10. [h] Unwin v. Wolseley, 1 T. R. 674.
[i] Mol. b. 2. c. 4. s. 15.

In case of joint and several covenants.

The covenants or agreements in a charter-party are joint or several, or both, according to the intent of the parties, or the words of the contract. Though a covenant be joint and several in the terms of it, yet if the interest and cause of action be joint, the action must be brought by all the covenantees; for if separate actions were brought, the court would be at a loss for which to give judgment; besides that the defendant might be several times charged for the same thing. On the other hand, if the interest and cause of action be several, it may be brought by one only[k]. But where two persons covenant jointly and severally with another, the covenantee may bring his action against all or either of the covenantors, without regard to their interest in the subject matter of the covenant; for they may bind themselves by contract as sureties, for the performance of the covenant[l]. If a charter-party between the owner or master and several merchants begin thus, "it is mutually covenanted between the parties, and each of them, in manner following," the covenants are joint and several, on both sides[m].

Part-owner's claim for freight is joint or several.

It is said by Malyne, that equity and fair dealing ought particularly to be regarded in seafaring causes[n]. Charter-parties have always been construed by the common law, as near as may be, according to the intention of the parties, and the understanding of merchants; and not by the literal sense of the words[o].

Actions

[k] Eccleston v. Clipsham, 1 Saund. 154, which cites Slingsby's case, 5 Co. 18, b. [l] *Id.* note 1. [m] Bolton v. Lee, 2 Lev. 56. [n] Mal. 101. [o] Mol. b. 2. c. 4. s. 3. *Ante*, 192, 3.

Actions for the recovery of freight are also treated favourably for the benefit of the ship-owners; therefore if four or five part-owners of a vessel make up their accounts with the freighters, and receive their proportions of the freight, the fifth may, it is said, sue singly by himself without joining the rest; and this as well by the common law as by the law marine[p]. Accordingly, it is said to have been ruled by Hale, C. J. that the claim of part-owners of a ship, for their shares of the freight, is joint or several at their election: and one cannot release the other's share of the freight; but if one take more or less than his share, the other may yet sue for the whole of his[q].

Who may sue for freight.

The party with whom the contract for the affreightment of the vessel, whether master or owner, is the proper person to sue upon that contract, for the non-payment of the freight, &c. or breach of any of the covenants contained in the charter-party, notwithstanding he may have assigned his interest in the vessel to another, since the making of the contract and before the commencement of the action. The right of suit on the contract being a *chose in action*, as it is called, (that is, a right to be enforced by action, and not already reduced into possession) is not by the law of England capable of assignment, so as to enable the assignee to sue in his own name; though he may institute a suit for his own benefit, in the name of the original party to the contract. If a charter-party of affreightment be entered into with a person as captain or owner of a vessel, describing him as such, though contrary

[p] Mol. b. 2. c. 4. s. 12. [q] Stanley v. Ayles, 3 Keb. 444.

contrary to the fact, it is presumed that the party hiring the vessel under such circumstances, will be bound at law to pay him the freight, &c. contracted for, as he will be estopped or prevented to deny the title of the person with whom he has so contracted, or to aver that he does not actually possess that character in which the contract was entered into with him, especially if it be by deed executed by both parties.

Till the mortgagee of a ship takes possession, the mortgagor is owner to all the world; he bears the expences, and is to reap the profits of the ship. Therefore an action cannot be maintained by the mortgagee against a person who contracted with the mortgagor for freight, where the latter has borne the expence of the outfit; though the mortgagee takes possession before the goods are unloaded, and pays the captain and mariners' wages for the voyage[r]. For the mortgagor in possession, in such case, cannot be considered as the servant or agent of the mortgagee; and if the voyage prove unprofitable, the mortgagor could not have recovered against the mortgagee the expence of the outfit. The payments being voluntary, cannot affect the mortgagor's right to get possession of the ship, and are at most but evidence of the mortgagee's possession[s]. Besides, the right to the freight under the original contract with the mortgagor, being a *chose in action*, cannot be assigned to the mortgagee so as to enable him to maintain a suit at law for it in his own name.

Who cannot; mortgagee, for freight contracted before he takes possession.

A covenant

[r] Chinnery v. Blackburne, 1 H. B. 117, a. [s] *Id.*

Vendee, by bill of sale during the voyage.

A covenant in a charter-party of affreightment to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. If the rights of the parties to receive the freight be considered with respect to the charter-party, no question could be made at law but that the assignees of the bankrupt are entitled to receive it. For the charter-party is a mere personal contract for the payment of the freight, and cannot be assigned to the vendees by the transfer of the property in the ship. At law, it is impossible to say that the covenant is transferred to the assignees of the ship, by the assignment of the property in the vessel, in the same manner as certain covenants are said to run with land[t].

Assignee of ship or freight, before or during the voyage.

If there were any difference between the case of an assignment before and during the voyage, the assignee in the former case might sue for the freight. But in truth there is no such difference. In either case, in order to succeed at law, it is necessary to sue in the name of the contracting party, and neither the assignee of the ship or the freight, nor any other person not a party to the contract of affreightment, can bring an action upon it, or sue for the money due in his own name, whether the assignment be made before or after the voyage is commenced; no legal interest therein passing by an assignment[u].

But

[t] Splidt v. Bowles, 10 East 279. 281, 2. [u] Morrison v. Parsons, 2 Taun. 407.

But the payment to one who is entitled to receive the beneficial produce of a contract, though he be no party to it, may yet have the same effect as payment to him who is a party. An assignment of a ship carries with it the benefit of a contract by charter-party for the affreightment of it, especially where the plaintiff, having made such contract, afterwards assigns the ship before she sails, so that the assignee to all intents and purposes is in possession of her as owner before her sailing. As to equity, whoever has the prior equity has the prior right; therefore payment to a person who has an authority from the legal creditor to receive the debt, is a good payment to the creditor himself. The assignee of the charter-party, cannot be in a better situation than the person who has assigned it to him was, at the time of the assignment; and if he have previously assigned the ship, that will prevent the assignee of the charter-party from receiving the freight under it. The assignee of a bond receives the debt due by the bond as attorney of the obligee; but the right to freight accruing subsequent to an assignment of the ship, must belong to the assignee of the vessel as incident thereto. On this principle the idea of Lord Ellenborough appears to have proceeded, that after the abandonment of a chartered ship to the underwriters they would be entitled to freight subsequently earned[v]. In the case cited, the owner of a ship, after entering into a charter-party or agreement without seal for the affreightment of it, executed a regular assignment of the ship to the master, without reference to the charter-party, and the vessel was accordingly

But payment to the assignee of a chartered ship is payment to the original owner.

[v] Morrison v. Parsons, 2 Taun. 407.

accordingly registered in the name of the master, under whose command she sailed on the chartered voyage. Afterwards, the former owner of the ship being indebted to a third person, by indenture reciting the charter-party, in consideration of that debt, assigned to the creditor all his right to the monies becoming payable by the charter-party, upon trust to defray the costs of the assignment, and pay himself the charges of effecting an insurance upon the freight; and then to apply the balance in payment of the debt and interest, and in case of any surplus to pay it over to the assignor; with a power of attorney to receive the freight, and effect the insurance. The creditor under this assignment required the freighter not to pay any person but himself; but he, without waiting for the expiration of the time when the freight would be payable by the charter-party, notwithstanding the assignment of it and notice, paid the whole freight to the captain, the assignee of the ship, who was also a creditor of the original owner, for monies advanced for the ship's use; whereupon an action of *assumpsit* for the freight was brought in the name of such owner for the benefit of the assignee of the freight. At the trial the jury found a verdict for the defendant, having taken upon themselves to decide in the affirmative the question of law, whether, by the transfer of the ship, the inchoate right to freight was also transferred. A new trial was moved for upon the authority of the case of Splidt and Bowles[w]. But the court, without impugning the authority of that case, held, that although the action appeared to be properly brought, (as it was,) in the name of the original

[w] 10 East 279.

original owner of the vessel, with whom the charter-party was entered into; the assignment of the ship having carried with it the benefit of the contract for the freight, and the assignee of the ship being in full possession of it as owner before she sailed, in law as well as equity, the payment to the assignee of the ship was a good payment, in preference to paying the person to whom the freight was intended to be afterwards assigned[x]. Indeed as against the original owner of the ship, who was the plaintiff on the record, there could have been no doubt upon the law of the case; and unless upon the ground of fraud, which was not supposed to exist, between such owner and the captain, to whom he first assigned the ship, there could be as little equity in the case. The subsequent assignment of the freight seems to have been in fraud of the assignment of the ship, especially as the latter does not appear to have been taken notice of in the assignment of the freight; and it is impossible to imagine that the owner could think himself entitled to the freight, or to make an assignment of it, he having assigned the ship before it sailed on her voyage.

Who may in general be sued for it.

As the person with whom the charter-party is entered should always sue for the freight, &c. under it, whether he ever had or continues to have any interest in the ship[y]; so, the person or persons covenanting or agreeing for the payment of the charges, is always liable to be sued for the non-payment of them, whether they ever had or have any interest in the goods or not, being bound by the express contract. The delivery

[x] Morrison v. Parsons, 2 Taun. 407. [y] *Ante*, 214.

delivery of the goods is always a sufficient consideration for such contract, where a consideration is necessary, the contract not being under seal[z]; and we have seen that where it is under seal, no consideration is necessary. Where there is a covenant under seal, no agreement, verbal or written, not by deed, can be made the ground of action between the same parties, respecting the same subject matter as is provided for by the deed, a specialty, or contract under seal being an obligation of a higher nature than a simple contract, or agreement not under seal, and therefore merging or doing away the effect of such simple contract. But this merger can only affect such contracts between the same parties, respecting the same subject matter; or at all events cannot affect the contracts of other persons not entered into at the same time, or in pursuance of one and the same original agreement[a].

The consignor of the goods.

There can be no doubt whatever at this day, but that if the consignor enter into the charter-party, and covenant for the payment of the freight and charges, he will be liable to the payment of them; nor will his liability be discharged or affected by the master's delivery of the goods to the consignee, without obtaining payment of the freight from him, though the goods are consigned under bills of lading, containing the usual clause for delivery to the consignee or his assigns, he or they paying freight, &c. and the covenant in the charter-party be to pay it on right and true delivery, according to the bills of lading; for this clause is only inserted for the benefit of the master. Either he or the

[z] *Ante*, 212. [a] Pudsey's case, 2 Leon. 110. 2 N. R. 276. 10 East 378.

the owner may therefore sue on the covenant in the charter-party for the freight or other charges, notwithstanding such delivery of the goods[b], though the contrary was once ruled by Lord Kenyon[c].

The consignee, or his assignee of the bill of lading.

The consignee of a bill of lading is liable to the freight, if he accept the goods[d], or if they are delivered according to his order, or when they arrive he refuses to accept them; at all events he is liable to damages for such refusal, unless it be on account of some fault or neglect of the master or owner of the ship. Where the bill of lading was to the order of the shipper only, and not to the shipper or his assigns, in a *nisi prius* case, Lord Kenyon held that the consignee was the person liable to the freight, and not any other person to whom he might sell the goods; because that would be to enhance the price on him; as he must be supposed to buy them at a certain price, independent of all charges of carriage, &c. unless such charges are made part of the bargain. Another reason for his lordship's opinion was, that a right of action could not be transferred from the person liable, to another, by such person's own act; and therefore he who is first liable must remain so, nor could any supposed custom to the contrary alter the law[e]. But in a subsequent case Sir James Mansfield held, that the person to whom the goods are delivered, though not the consignee, makes himself liable to the payment of freight by the acceptance of the goods, it being the delivery and

[b] Christy *v.* Row, 1 Taun. 300. Shepard *v.* De Bernales, 13 East 565. [c] Penrose *v.* Wilks, II. 30 *Geo.* 3. Abbot, 289, 90. [d] Roberts *v.* Holt, 2 Sho. 443. [e] Artaza *v.* Smallpiece, 1 Esp. 23.

and acceptance that constitute the liability; and if the party accept the goods, though delivered by mistake, he shall not be permitted to say that the delivery was wrong[f]. In this case it does not distinctly appear how the bill of lading was, it being only stated, that the corn had been consigned to one Sayers at Lynn Regis, and the plaintiff, in place of delivering it pursuant to the bill of lading at Lynn, had carried it to London, and delivered it to the defendants. In a subsequent case however, where the bill of lading was for the delivery of the goods to the order of Messrs. H. and D. or to their assigns, he or they paying freight for the same as customary, with primage and average accustomed; and the bill of lading was indorsed by H. and D. to one Peters, who indorsed it to the defendant, to whom the goods were delivered; Lord Ellenborough held that the defendants, by becoming assignees of the bill of lading and receiving the goods, had adopted the contract; and that there was no transfer of contract or right of action, for till the delivery there was no debt due to any one, and it was uncertain who would become party to the contract. The bill of lading (his lordship said) might be considered as drawn in blank, and filled up with the name of the person to whom the delivery was made. The liability was to devolve upon a sort of floating appointee, who, when appointed, was the party entering into the contract. On a motion for a new trial, the court thought that the defendant by accepting the goods entered into an implied undertaking to pay the freight; and a rule to shew cause was refused[g]. Lord Ellenborough, C. J. in

[f] Seggart v. Scott, 6 Esp. 22. [g] Cock v. Taylor, 2 Camp. 586.

in this case went the length of saying, he did not think that the opinion delivered in the case of Artaza and Smallpiece was well founded; because, though there were no original privity of contract between the parties, for payment of the freight; yet the taking of the goods from the ship by the purchaser, under the bill of lading, was evidence of a new agreement by him, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight due for the carriage of such goods, the delivery of which was only stipulated with the shippers to be made to the consignees named in the bill or their assigns, he or they paying freight for the said goods. The other judges concurred with the Lord Chief Justice in this idea, of the delivery to and acceptance by the defendant being evidence of a new contract[h].

Aliter, if assignee do not obtain the goods as such. *Semb.*

But it seems that the mere obtaining of the goods by the indorsees of the bill of lading, under an order of the consignees on the West India Dock Company, if the goods be not obtained *under the bill of lading*, will not subject the indorsees of it to an action for the freight[i]. In the case cited, the consignees pledged the goods with the defendants who were brokers; and indorsed the bill of lading to them. The goods were entered in the books of the West India Dock Company in the names of the original consignees, in correspondence with the entries and the ship's manifest; though the defendants entered the goods at the custom-house in their own names. The goods were obtained by the defendants from the Dock Company under an order from the consignees, without producing the

[h] 13 East 399. S. C. But see 1 East 514, *per* Le Blanc, J. [i] Wilson v. Kymer, Abbot, Append. 645, 6.

the bill of lading. At the trial, the plaintiff obtained a verdict, upon the authority of the case of Cock and Taylor; but upon a motion for a new trial, some of the judges thought, that as the defendants had not obtained the goods as indorsees of the bill of lading, it was materially different from that case; and a new trial was granted[j]. However a second jury found the same verdict, upon the ground of usage; and a second new trial was refused.

A mere agent of the consignee is not liable.

A mere agent, who has no interest in the goods, is not liable for freight by his acceptance of the goods as such agent. For where A. and B. merchants abroad, shipped tobacco for Liverpool consigned to A. himself there, and the plaintiff, the master of the vessel, signed bills of lading for delivery to A. or to his assigns; one of the bills was sent inclosed in a letter from the shippers to C. at Liverpool, advising him of such consignment to A. and that A. intended to proceed to Liverpool; but in case he should not arrive in time, desiring C. to do the best for them; the tobacco having arrived in a damaged state, was deposited in the king's warehouse pursuant to the statute; after which C. acting as agent for A. with the knowledge of the captain, made an entry of it in his own name in the custom-house, to avoid seizure: it was held that this was not such an acceptance of the cargo by C. as would make him liable to the captain for the freight, because the defendant was neither consignor, consignee, nor assignee of the goods, but acted only as agent of one of the shippers[k].

Consistently

[j] Wilson v. Kymer, Abbot, Append. 645, 6. [k] Ward v. Felton, 1 East. 507. But see 2 Taun. 358, 9.

Vendee of freighter.

Consistently with the rule laid down by Lord Kenyon in the case of Artaza and Smallpiece[l], it was held by Sir William Scott in the admiralty court, that freight can only be claimed of the freighter or the consignee of the goods; and that although the master's lien for it be discharged by an embargo, and the shippers become bankrupts, yet a person to whom they have sold the goods before arrival is not liable for the freight, inasmuch as he is no party to the contract of affreightment, and obtains the goods under a legal title at a time when the lien of the master for his freight is discharged[m]. In the case cited, the consignees had actually paid a part of the freight to the master, who received it from him on account; which circumstance certainly negatived any thing like an implied contract on the part of the vendee. But that does not appear to have been relied on, though it was noticed by the court. The judgment seems to have proceeded solely on this ground, that the master has only two securities for his freight, the one the personal security of the freighters, the other the real security by lien on the goods; and that the vendee should not suffer by the master's loss of his lien by the embargo, which was a public act, nor by the bankruptcy of the consignee, which was his private misfortune; for the master looked only to the freighters, who alone were bound by the charter-party for the payment of the freight, and to whom the vendee of the goods was wholly a stranger, except as he became the representative of the freighters. The vendee had obtained an order for the delivery of the goods on giving a bond or recognizance with sureties to abide such

[l] 1 Esp. Rep. 23. [m] Theresa Bonita, 4 Rob. 236.

such further order as should be made respecting them; but this was held not to alter the case, the demand of freight being considered, under the circumstances, as one to which he was not in equity liable[n]. However the authority of this decision of Sir William Scott seems to be materially shaken, if not quite over-ruled, by the late decisions of the court of King's Bench, that the law will in such cases, imply a contract to pay the freight, &c. on the receipt of the goods[o].

[n] Theresa Bonita, 4 Rob. 236. [o] *Ante*, 221, &c.

CHAPTER

CHAPTER XI.

OF THE DECLARATION AND PLEADINGS.

Division of chapter.

IN noticing the rules of pleading in actions upon charter-parties of affreightment, it will be proper, first, to consider the form of declaring and pleading in cases where the charter-party is under seal, and then the form used where the contract is not under seal; not only the form of action, but that of the pleadings also being very different, according to the mode in which the charter-party is executed. In discussing the form of declaration on sealed instruments of this nature, the first consideration is how to state the deed; secondly, the averments of performance and non-performance in general, and those in particular of the arrival or condemnation of the ship, where that is a condition precedent; and thirdly, the assignment of breaches. It should here be observed, that the rules respecting the averments and assignment of breaches, where the charter-party is under seal, are equally applicable to a special count on a charter-party not under seal; the main difference being, that in the latter case alone, common *indebitatus* counts for the freight, or demurrage, &c. can be used; the form and use of which counts will

 therefore

therefore be considered in the fourth place. They may indeed be added to special counts on the charter-party in debt, though not in covenant. After considering the form of the declaration on charter-parties in different cases, it is proposed to make some observations on the form of pleading to such declarations; first, where the contract is under seal; and lastly, where it is a simple contract not sealed. In the appendix at the end of the book, some forms of declarations and pleadings will be found, which will at the same time exemplify the observations made in the course of the work upon this part of the subject, and furnish (it is presumed) precedents which may safely be followed on future occasions; though where there is any difficulty or novelty in the case, it is hardly necessary to suggest the propriety of adapting the pleadings so as to meet that difficulty, and the real truth or legal effect of the transaction.

Form of declaring, on charter-party under seal.

If the charter-party be under seal, it must be specially declared upon, in an action of debt or covenant. The plaintiff cannot declare in such case generally, and give the deed in evidence[a]. In Atty and Parish indeed, the charter-party contained several conditions precedent to the claim of freight, and the covenants were as special as could be imagined; though the decision did not proceed upon the particular stipulations in the charter-party, but on the general principle that the action was founded on a deed, and the defendants being by a general mode of statement, deprived of the advantage of its being specially declared upon with a *profert.* It was admitted, that in the case of *debt* for rent upon a lease by deed,

[a] Atty v. Parish, 1 N. R. 104.

deed, the deed need not be declared upon; but that exception was considered as having proceeded on the ground, that by the demise an interest passed in the land, and that it was for the enjoyment of that interest the action is brought, so that the deed in such case is only inducement to the action[b]. Nor is the action in that case brought upon any covenant or agreement, it being upon the demise. But if the plaintiff declare in an *indebitatus* count for freight or any other cause, the declaration imports a parol agreement, and the issue is whether the defendant be indebted by any such agreement[c]. It never was doubted but that *indebitatus assumpsit* would not lie for freight or demurrage, where the contract is by deed between the same parties; for that species of action is not founded on any debt, but the implied promise to pay[d]. In a *Nisi Prius* case, (but which seems to have passed without much observation,) it was held, (as I have been informed, on the authority of Atty and Parish,) that *indebitatus assumpsit* could not be maintained by the owners of a ship for freight, because a charter-party (which the owners did not execute) was entered into with the captain by deed[e]. But this seems to be carrying the doctrine of merger farther than it had ever before been extended.

With respect to the form of declaring on the charter-party in debt and covenant, it is for the most part so very similar, that both modes of declaring may be considered together. One or two observations only will be necessary, by the way, to point out such difference

How to state the deed.

[b] Atty *v.* Parish, 1 N. R. 104. [c] *Id.* [d] *Id.* [e] Richardson *v.* Hanson, T. 46 *G.* 3. K. B. *Ante.*

ference as there is between the two forms of declaration. And, first, with respect to the statement of the contract. In each form of action, the charter-party itself, or rather so much of it as is relevant to the plaintiff's claim should be set out, with accuracy. The date, or day of making it, should also be alleged, and the venue laid as the place where it may be supposed to have been made. If the date be no essential part of the contract, an account of the calculation of the time of sailing, or payment of the ship's hire, &c. being reckoned from it, exactness as to the day is not material; at all events, if it be not stated as the day on which the charter-party *bears* date, so as to make part of the description of the written instrument. A *profert* should be made of that part of the deed which is executed by the defendant, and which should be alleged to be sealed with his seal. The allegation of the making of the charter-party, implies delivery. In setting out the material parts of the contract, all that is necessary is that the statement be substantially correct. The substance or effect, indeed, alone may be set out; but that is not in general advisable, for fear of a misconstruction. The recital usually concludes with a *prout patet*.

Averments of performance, and non-performance.

The next thing is to aver performance of the contract, so far as may be necessary on the part of the plaintiff; in doing which, care must be taken that a strict compliance with all conditions precedent, and warranties on his part be alleged, and notice and request, where they are necessary, with proper time and place. And in order to remedy any defect in the particular allegations in this part of the declaration, it is usual and proper to conclude them with a general allegation

gation of performance on the plaintiff's part, of all things contained in the contract; which, although not sufficient to dispense with particular statements of performance where that is necessary, if a special demurrer be put in by the defendant for the generality of the statement; yet will cure it on a general demurrer, and prevent a motion in arrest of judgment, or writ of error. There is also usually a general *protestando* against the defendant's having performed any thing in the charter-party on his part; the notion of which seems to have been to exclude the contrary conclusion, which might perhaps otherwise have been made in another action, for any other breach of the contract than that particularly declared on; but this seems a mere flourish in pleading, and the necessity or use of it is very doubtful, though being an usual form it should not unnecessarily be departed from.

Where averment of performance unnecessary.

Though a clause contain a condition precedent on the part of the plaintiffs, yet if it be rendered impossible of performance by the act, neglect or default of the defendant, that may be alleged to excuse the strict performance of the condition. And if a right of action be once fairly vested in the plaintiff, though capable of being divested by a subsequent non-feazance or the like, that being a circumstance which defeats the plaintiff's right of action, whether it be a proviso by way of defeazance, or condition subsequent, must in its nature be matter of defence, and ought to be shewn by the defendants; and after verdict for the plaintiff, must be taken not to have existed, so as to leave no ground for arresting the judgment, or the like. Thus, a clause in a charter-party that no claim should be admitted, or allowance made for short tonnage, unless

 it

it should appear on a survey by shipwrights to be chosen by both parties, is not a condition precedent, the performance of which is to be averred by the plaintiff in his declaration, but matter of defence to be relied on by the defendant in his plea; and consequently the not alleging performance of it is no ground for arresting the judgment[f].

Averment of arrival.

As freight is the mother of wages, so, the arrival of the ship is the mother of freight[g]. Therefore if a man freights a ship out, and covenants that she shall with the first wind and opportunity sail to the port of Cales, and the freighter covenants to pay for the freight of all the premises such a sum, he cannot maintain an action against the freighter, without averring and proving the ship's arrival at Cales[h]. But though a ship be chartered to perform her voyage in a given time, and exceed it, she is nevertheless entitled to her freight, if she begin the voyage within the given time; thus, if it be agreed that the master shall sail from London to Leghorn in two months for a stipulated freight, and he begins his voyage within the two months, though he do not arrive at Leghorn within that time, yet the freight is due[i]. It follows, that the time at which the arrival of the ship is alleged, even in such case, is immaterial. *A fortiori* therefore, is it so in common cases.

Averment of condemnation.

An averment of condemnation of the ship, where that is a condition precedent, must shew it to have been

[f] Hotham v. E. I. C. 1 T. R. 638. [g] Abernethy v. Laudale, Doug. 523. [h] Mol. b. 2. c. 4. s. 16. *Ante*, 75. [i] *Id.* s. 6.

been by competent jurisdiction. In covenant on a charter-party, whereby it was agreed to employ a ship of which the plaintiff was the captor, as soon as sentence of condemnation should have passed, the sentence must be taken to mean a legal sentence, and the party who sues for the freight must aver that the ship was condemned by a court having competent jurisdiction; a legal condemnation being a condition precedent[j]. The declaration stated, that before the charter-party, the ship had been captured and brought into St. Helena, and a suit had been instituted there on behalf of the captors, before certain commissioners appointed by the royal charters under the great seal, and confirmed by several acts of parliament, for the purpose of distributing justice in all maritime causes, concerning any ships brought *within their jurisdiction*, for the purpose of obtaining sentence of condemnation, which suit was depending at the time of making the charter-party; and that such sentence was passed upon the ship in the said suit; and an averment was made that this sentence was that mentioned in the charter-party. Yet it was held that the legality of the condemnation being matter of law, it could not be supplied by any averment that the contract referred to the sentence at St. Helena. If there could be no legal condemnation except by the court of admiralty, it must be taken that the parties meant that; and as the sentence was passed by a court out of the ordinary course of law, and not authorized by any public act of parliament, the plaintiff was bound to shew that it had competent jurisdiction, to proceed *in rem* and condemn the ship[k].

The

j Unwin *v.* Wolseley, 1 T. R. 674. k *Id.*

Assignment of breaches, in general.

The breach in actions of this nature, as in all other actions of contract, must, if in the affirmative, be alleged with certainty of times and sums, &c. And the safest way always is to assign the breach in the words of the charter-party, where that includes the meaning of the contract; but care must be taken that its meaning is embraced, which is all that is necessary to be attended to. If it be requisite, different counts may be added, as upon different charter-parties, for the penalty, and also for general damages; but it is useless to declare for the penalty where there can be no further breach, for which the penalty can be wished to stand as a security. In a count for the penalty, if several breaches be assigned, it is usual to take notice of the statute 8 & 9 *W.* 3. c. 11. s. 8. in the assignment of the breaches subsequent to the first. And since that statute, the plaintiff may, in all cases, assign as many breaches as he pleases. It is usual to conclude each affirmative breach, by alleging it to be, " contrary to the form of the charter-party, and the defendant's covenant;" but I am not aware of any authority or principle of pleading shewing this to be necessary, which it clearly is not in the assignment of a negative breach, in the words of the defendant's covenant.

For more or less than is due.

Though upon the face of the declaration in covenant, it appears that the plaintiff has demanded more than is due upon one breach, and less upon another, after verdict it is unquestionably cured; though upon general demurrer it would be doubtful, and upon a special demurrer it would be clearly bad[1]. In the

[1] Bolton *v.* Lee, 2 Lev. 56.

the case cited, Hale, C. J. is reported to have taken a difference between an action of covenant, and debt. But since it has been held that it is not necessary for the plaintiff, in the latter action any more than the former, to recover the exact sum declared for, there seems to be no ground for a distinction, between the two species of action in this respect. However where debt was brought for the penalty in a charter-party, whereby the defendant covenanted to pay the plaintiff £3 *per* ton for goods imported, and the breach was assigned in not paying for so many tons and one hogshead amounting to so much, upon demurrer the declaration and assignment of breach were held bad for including the hogshead, the covenant being only for the payment by the ton; though the court suffered the plaintiff to discontinue on payment of costs, notwithstanding the action was for a penalty, and the case had been argued[m].

Per quod actio accrevit.

If the declaration be in debt, whether the penalty be declared for or not, as the debt does not as in the case of a bond arise by the deed itself, but from matter subsequent, it is usual and proper, after stating the fact which constitutes the breach of covenant relied upon, to say, by way of a conclusion of law, "whereby an action accrued," or, "has accrued to the plaintiff, to demand and have from the defendant, the sum demanded" in respect of that breach. But in *indebitatus* counts in debt for freight, &c. this is not necessary, as the debt is the immediate and sole allegation of the count; and this form of *per quod actio*

[m] Rea *v.* Burnis, *Id.* 124.

actio accrevit is therefore never inserted in the old precedents of *indebitatus* counts on a *mutuatus*, or the like, though it is not unusually introduced by some modern pleaders into such counts. However the insertion or omission of this allegation perhaps, is not in strictness at all material, and could not be even assigned for cause of special demurrer; though as it is the principal distinguishing form between the declaration in debt and covenant, it has been thought worthy of this notice.

Form of declaring for freight, &c. if no charter-party under seal.

If there be no charter-party under seal, the plaintiffs may declare for the freight, demurrage, or other charges, by way of *indebitatus assumpsit*. In the case in Ventris, where error was brought on the ground of *assumpsit* not being a proper action for the recovery of freight[n], objection appears also to have been taken to the generality of the form of declaring. But the court answered the objection by saying that it was as groundless, as it would be to object to the common form of declaring for goods sold and delivered, which is as general as possible. The truth is, that in this form of action the greatest latitude is allowed, it having been held that any general description of the debt, which will shew it proper for this species of remedy, is sufficient. The reason is, that the debt is only inducement to the statement of the promise; and therefore cannot be separately traversed or put in issue, though it is involved in the general plea of *non-assumpsit*; which by putting in issue the promise, also draws into question the debt which

[n] Prior v. Shears, 1 Vent. 100.

which is the consideration and foundation whereon the promise alone can be supported. The usual form of declaring for freight by way of *indebitatus assumpsit* is, "for the freight of divers goods carried by the plaintiff certain voyages, and afterwards delivered to or for the defendant, at his request." An equally general form is also sufficient in declaring for demurrage; which may be done either by declaring for the demurrage *eo nomine*, "or for the use and hire of a certain ship or vessel of the plaintiff, by him let to freight or to hire to the defendant, and by the latter kept on demurrage, for a long time, at his request." The particular voyage, or length of time, or other terms of the contract of affreightment, need not in either case be stated.

For the use and hire of ship.

Where there is a contract under seal, the party cannot dispense by parol with the performance of any of the covenants contained in it; but a parol contract made after the sealed instrument, to take effect before, may yet be enforced by action of *assumpsit*, on the common count for the use and hire of the ship. The plaintiffs, having contracted by charter-party under seal to let a ship, then in the Thames, to freight to the defendants for eight months, to commence from the day of her sailing from Gravesend on her voyage; and having covenanted that she should sail from the Thames to any British port in the English channel, there to load such goods as the freighters should tender, and sail to the West Indies and bring back a return cargo to London; afterwards agreed by parol with the defendants, that the ship, instead of loading at some port in the channel, should load in the Thames, and

and that the freight should commence from her entry outwards at the custom-house; and it was held that this subsequent parol contract was distinct from and not inconsistent with the contract by deed, being anterior to it in point of operation though executed afterwards, and that it might therefore be enforced by action of *assumpsit*[o]. In the case cited, Lord Ellenborough, C. J. observed, that there was no conflict between the sealed charter-party and the subsequent parol agreement, which merely borrowed some of the terms of the charter-party by reference thereto, but did not contradict or dispense with it; and there was no objection to give an earlier reward, for an earlier inception of the service than that which was provided for by the deed. The first count in the declaration was special, stating the charter-party, and that in consideration of the plaintiff's permitting the ship to take in the goods in the Thames, instead of her loading at a port in the British channel, the defendant promised to pay for the use of the ship at the rate mentioned in the charter-party, from the day the ship should be entered outwards at the custom-house. There were also general counts for the use of the ship. Lord Ellenborough seems to have thought that the plaintiff might have stood upon these alone; and that the special count was unnecessary, and superfluous[p].

For not paying the carriage of goods in advance.

If the plaintiff would declare on a special contract to pay for the carriage of the goods, on their being loaded on board the vessel, or on delivery of the bill of

[o] White v. Parkin, 12 East 578. [p] *Id.*

of lading, it should be specially alleged in the declaration; which must not state the promise to be to pay the money due *for freight;* for we have seen[q] by the general law, nothing can be due on that account, until the arrival of the goods; therefore if the plaintiff so state the promise, it will be a fatal variance. The receiving of the goods on board should be stated, as the consideration for the defendant's promise to pay at that time, the sum which would be due for carriage in case of the arrival of the goods; and then it should be averred how much would become due on that account, in that event. Where the plaintiff declared in such case, on a promise to pay the sum due *for freight* on delivery of the bill of lading, and then merely averred the delivery of it, "by reason whereof the defendant became liable to pay so much for the said freight," on special demurrer, the declaration was held to be bad[r].

Form of pleading, on charter-party under seal, in general.

If the plaintiff declare in covenant or debt upon a sealed charter-party, there is no one proper plea to put in issue the whole declaration. If the defendant would deny the execution of the charter-party, he should plead *non est factum.* If he would admit that (which is usually done if there be no doubt about it), and deny the performance of any of the conditions precedent, or the like, on the part of the plaintiff, he must do that by a separate plea. If he would put in issue the truth of the breach or breaches assigned, by relying on payment of the freight or demurrage claimed

q *Ante*, 149. r Blakey *v.* Dixon, 2 B. & P. 321.

claimed, or the like; if he should plead payment, or performance, each of these pleas conclude to the contrary. But if he would allege any special matters in excuse of performance or discharge, his plea must conclude with a verification, to give the plaintiff an opportunity of answering them. Matters in avoidance of the deed by statute must also be specially pleaded. If the defendant would avail himself of all or several of these sorts of pleas at once, he may do so by leave of the court. And he may plead different pleas to different parts of the declaration. If the declaration be radically faulty, so that the plaintiff cannot obtain judgment on his own statement of the case, it is quite indifferent what the defendant pleads, for he must have judgment[t]; though a formal defect in the declaration may be cured by the defendant's plea. If the declaration be manifestly bad in substance, and cannot be made better by amendment, it is in general advisable to demur, and at once try the question at law; and this is the most prudent, as well as the fairest way; for if that be determined for the defendant on demurrer, he has judgment for his costs, which he has not on a motion in arrest of judgment, or writ of error.

Mutual covenants not pleadable in bar.

Where the covenants in a charter-party are mutual and reciprocal, whereupon each party may have his action against the other, the breach of one covenant cannot be pleaded in bar to an action upon another, but each party is put to his action to recover the damage he has sustained; for perhaps the damage on the one side and the other is not equal, and there is no mode

[t] Smith v. Wilson, 8 East 412.

mode of pleading in bar of part of the damages claimed by the plaintiff, if those sustained by the defendant be less; nor can the jury inquire into what damages the defendant has sustained, whether they be more or less than the plaintiff's damages, unless indeed the defendant's claim be liquidated so as to fall within the statutes of set-off. Therefore, where the plaintiff declared in covenant upon a charter-party, for freight and demurrage, stating that he sailed with the first wind, and so on, according to the articles; and the defendant pleaded as to the freight, that the ship did not return directly to her port of discharge, but made divers deviations from the chartered voyage, whereby the goods were spoiled; and as to the demurrage, that it was occasioned by the neglect of the mariners, to attend with their boat to reload the ship; on demurrer the court, for the above reasons, gave judgment for the plaintiff[t]. So, where to a similar action, the defendant pleaded that the ship was not ready to sail by the appointed day, whereby he lost the profit of his merchandizes, the plea was over-ruled upon demurrer[u].

Plea should answer the whole declaration.

In a work of this sort, it cannot be expected that all the particular rules of pleading should be nicely investigated. After the general observations which have been made, the author only has to mention some few cases of pleading which have occurred in actions on this particular species of contract. A plea is bad if it answer part only of the charge in the declaration: therefore, where the plaintiff declared upon the defendant's

[t] Cole v. Shallett, 3 Lev. 41. [u] Shower v. Cudmore, T. Jon. 216.

fendant's covenant to ship 280 soldiers, and pay for their carriage to Ireland £5 a man; and assigned for breach, that the defendant had not the 280 men ready, but only 180, which the plaintiff carried to Ireland, but the defendant had not paid for their carriage; and the defendant pleaded that he had the 280 men ready, and offered to ship them, but the plaintiff would not receive them; without answering to the non-payment for the 180 men carried; for this reason judgment was given for the plaintiff, upon demurrer, because the plea was pleaded as an answer to the whole declaration, but was an answer to part only, viz the charge for not shipping the full number of men, in respect of which the plaintiff claimed general damages; and was no answer to the other claim in the declaration, for the passage-money of the number of men actually carried[v].

How to plead a discharge from the contract.

Where the action was upon a contract to go a certain voyage before the month of August, and the defendant pleaded that, in April, before any breach of the contract, the plaintiff discharged him from it, without shewing how, viz whether by deed or not, yet it was held a good plea; according to the rule, *modo quo oritur eodem modo dissolvitur*[w]. The case cited was that of an action of assumpsit; but it is not now usual to plead specially any matters of discharge in that action, as formerly it was; for now they may, and are constantly given in evidence, under the general issue of *non assumpsit*. But the case is important, to shew the form of pleading in covenant or debt, upon a charter-

[v] Tompson *v.* Noel, 1 Lev. 16. [w] Langden *v.* Stokes, Cro. Car. 383.

a charter-party, under seal; in which actions matters of discharge must yet be specially pleaded. Again, where debt was brought upon a deed of covenant, that the plaintiff should raise five hundred soldiers, and bring them to such a port, and that the defendant should find shipping and victuals to transport them, for not finding which the action was brought; and the defendant pleaded that the plaintiff had not raised the soldiers by the appointed time: on demurrer, it was held that the plea was bad[x]. In this instance it was argued that the raising of the men by the appointed time, was a condition precedent; in which case, there can be no doubt but that performance of it must have been averred in the declaration, or the non-performance would have been matter in bar, which might have been taken advantage of by plea. At first the judges were equally divided upon this question, whether the finding of the soldiers was a condition precedent; but afterwards, one of the two who thought it was, changed his opinion; whereupon, by the opinion of the majority of the court, the plaintiff had judgment *nisi*[y]. To the foregoing principle, may also be referred the case of Tompson and Noel, before cited[z].

Rejoinder departing from plea, bad.

The pleading is bad where it departs or varies from the previous allegations. Where subsequent pleading pursues and fortifies the former matter pleaded, it is no departure; but it is otherwise where there is new and different matter stated in the rejoinder, from what was alleged in the plea. Therefore, where in debt upon a bond conditioned for the payment of the ship's hire

[x] Ware *v.* Chappell, Sty. 186, cited 2 Mod. 75. [y] *Id.* [z] *Ante*, 242.

hire and mariners wages, on their direct return from a certain voyage, the defendant pleaded that the plaintiff had not performed the voyage, and that it was unfinished; the plaintiff in reply stated, that he had performed it, and returned again; and the defendant in his rejoinder stated, that it was but a month's voyage, and the plaintiff had made it longer, by not returning the right or direct way, and so brought a greater charge upon the defendant: on demurrer the court was inclined to hold this rejoinder bad for departure from the plea; which (the reporter says) the parties perceiving, ended the cause by reference[a]. Departure should always be assigned for cause of special demurrer. The above may, it seems, be referred to that class of cases, where it has been held that sailing of the ship on or before a certain day, or the like[b], is not a condition precedent, or any substantial part of the contract to prevent the plaintiff's recovery of what is due to him for freight or demurrage, whatever remedy in damages the defendant may have by cross action. But there is this distinction between the cases, that in the instance of a bond, there can be no remedy for the defendant by cross action.

Form of pleading on charter party not under seal.

If the charter-party declared upon be not under seal, or the plaintiff relies upon the common *indebitatus* count for freight or demurrage, or for the use and hire of the ship, the general issue is, in a great majority of cases, the only necessary plea, whether the action be debt or assumpsit. The general issue in the former of these actions is *nil debet*, and in the latter *non assumpsit*;

[a] Holland v. Harcourt, 1 Buls. 176. [b] *Ante*, 41, &c.

sit; under either of which any matter in denial, avoidance, performance, excuse of performance or discharge, may be, and usually are, given in evidence without special pleading, with the exceptions of a tender, the statute of limitations, or a set-off; the latter of which may either be taken advantage of by way of notice or plea, except where the action is for a penalty, and then the latter mode of taking advantage of a set-off is alone proper. If the declaration contain several counts in debt, some of them upon the sealed instrument, and others common *indebitatus* counts, it is hardly necessary to mention, that the defendant should plead separately to them, applying the general issue of *nil debet* to the latter counts only. And although it is not necessary for him to plead specially to such counts, except in the above cases of a tender, &c. yet where the defence consists of matter of law, he is at liberty to do so if he thinks proper, and it is sometimes desirable for the purpose of compelling the plaintiff to reply specially, that the defendant may know the plaintiff's case, and confine him to a single answer.

CHAPTER XII.

OF THE REMEDY IN EQUITY.

In what cases this remedy may be had.

THE remedy which may be obtained in equity, in cases of contracts of this nature, is two-fold; first, for the freight, or other claim of a liquidated nature; and, secondly, against the penalty in the charter-party. Equity cannot give relief either for or against claims of an uncertain nature, upon this or any other species of contract, on which there is a remedy at law to obtain damages; there being no mode of ascertaining such damages by the intervention of jury, in equity, as there is at law.

Equity will relieve if demand just, and no remedy at law.

Though a charter-party be so penned that nothing can be recovered at law, yet if the plaintiff have a just demand, he may be relieved in equity. Therefore, where there was to be no freight paid for the outward-bound cargo, but only a certain rate *per* ton for the cargo homeward bound, and when the ship arrived beyond sea the factor had no goods to load, so that she was forced to come home in ballast, a court of equity decreed the payment of freight[a]. Indeed

[a] Westland v. Robinson, cited 2 Vern. 212.

deed in such case, if there be the usual stipulation on the part of the merchant to load the ship, he would be liable to an action at law for dead freight, as it is called, viz. for damages to the extent of such freight as the ship might have earned, if fully loaded. Equity has also relieved against the letter of a charter-party, under similar circumstances to the above, where the goods were seized and attached without any fault in the owner or master[b]. In another case, where the East India Company refused to pay any thing for freight or demurrage, because by the express provision of the charter-party, they were not to pay until six days after the ship's arrival in England, and the discharge of her lading; yet she having been detained so long abroad in the company's service, that on a survey she was found not sufficient for a voyage to England, in consequence of which the seamen were discharged, and she was left at Bombay, so that no freight could be recovered at law upon the charter-party; equity decreed relief, according to the quantities and proportions of the respective commodities usually brought home on such a voyage[c].

Though suit in foreign court by master.

If a cause respecting freight be fully determined in a foreign court of competent jurisdiction, then the question is concluded as against the parties to that suit, and the claimant cannot sue in the courts here; but if a suit be instituted in a foreign court by the master, and the damages not being fully ascertained, another suit at law is instituted here by the owner, a court of equity will, if the justice of the case require it, order the trial of the action at law upon the covenants

[b] Anon. *Id.* [c] Edwin *v.* E. I. C. 2 Vern. 211.

nants in question at the suit of the owner, and that the other party give in evidence such matters as are equitable in mitigation of the damages. Thus, where the master demanded his freight, out of which a deduction was insisted on, for a short delivery and the damaged state of the part delivered; a suit was instituted in the court at Barcelona by the master, against one Dalmasie, to whom the goods had been delivered, for the freight; and a cross suit was instituted by Dalmasie for the deduction claimed; whereupon the court there ordered the whole freight to be brought into court, and consideration to be had of the damages to be deducted. An appeal was then made by Dalmasie to a superior court. Upon this Horseman, the owner of the ship, sued Newland, who had covenanted to pay the freight, on the charter-party here; and Newland filed his bill in Chancery to stay the proceedings, though the suit was only to recover damages, and not for the penalty. Aud the Lord Chancellor ordered that Horseman should proceed to a trial against Newland upon his covenants, for the non-payment of the freight; and that Newland might, in mitigation of the damages, give evidence of such deduction as he was entitled to[d].

If fraud be practised by one of the freighters.

A *fortiori*, equity will relieve against a fraud practised by one of the freighters, to protect himself from the payment of freight by the language of the charter-party. The plaintiffs, together with the defendants, were part-owners of the vessel, which they let at £80 *per* month, with a stipulation that if she should

[d] Newland v. Horseman, 2 Chan. Cas. 74.

should miscarry before her delivery in Virginia, then no freight was to be paid. The vessel put into Barbadoes in the course of her voyage, where one of the freighters unloaded her; and although she was worth £600, he fraudulently caused her to be condemned there, and he himself bought her for £185. The court decreed the defendants to account and pay £80 *per* month for freight till the ship's arrival at Barbadoes, deducting the shares of those who sold her. But (says the report) for the value of the ship, the plaintiffs could not be relieved in equity, but at law*.

If a charter-party be obtained by fraud, like any other contract so obtained, it is unavailable at law or in equity. And it seems that if by fraudulent concealment of a former agreement, to let the ship to freight at a small sum, the owner obtains a new agreement for a larger freight, equity will relieve against it; unless the performance of the first agreement be obstructed by an embargo or otherwise, in which case a court of equity will not interfere. A merchant in town hired a ship to freight for a voyage to Bourdeaux at £3. 10*s.* *per* ton, and an embargo was laid upon all merchants ships for six weeks. The vessel afterwards proceeded on her voyage to Bourdeaux, and the merchant's agents there, not knowing what agreement had been made in England, consented to allow £6. 10*s.* *per* ton; upon which agreement there was a verdict at law. A bill was then brought to be relieved against the verdict, upon the ground of this latter contract having been obtained by a fraudulent concealment of the former one. But

But not against a second agreement for larger freight, if there be no fraud.

* Norton v. Serle, Cas. temp. Fin. 149.

But the bill was dismissed; the court considering the owner or master at liberty to make the second agreement, because the performance of the first had been obstructed by the subsequent embargo [f].

Freight denied to part-owner, refusing to join in outfit.

A part-owner of a ship sued the other owners for his share of the freight on finishing her voyage, but the other owners had fitted her out, in the expence of which the complainant would not join; whereupon the other owners complained in the admiralty; and by order there, they gave security, if the ship perished in the voyage, to make good to the plaintiff his share, or to that effect. In such case however it seems, that by the law marine, and course of the admiralty, the plaintiff is entitled to no share of the freight. It was referred to Sir Lionel Jenkins to certify the course of the admiralty; who certified that it was universally as above stated, for otherwise there could be no navigation: wherefore the plaintiff's bill was dismissed [g].

Relief against the penalty in equity, where less due.

If an action at law be brought for the penalty of a charter-party, and the plaintiff obtain judgment for the whole penalty, though so much is not due to the plaintiff, the defendant may be relieved in equity, upon payment of the principal money due, interest and costs; and if the plaintiff put in a bad answer, and insist on more than is really due, he will lose his costs in equity, though entitled to his costs at law [h]. In the case cited, the Chancellor ordered the master to compute interest on the balance due for freight, and

[f] Draddy v. Deacon, 2 Vern. 242. [g] Anon. in Chan. 13th July, 1689. Beawes, 137. [h] Forward v. Duffield, 3 Atk. 555.

and that a sum less than that balance paid under a previous order should be applied in reduction of the principal and interest; and that on payment of the residue of the principal and interest found due, with the costs, both sides should deliver up the charter-party, and the plaintiff at law should acknowledge satisfaction on record of the judgment at the defendant's expence; but that in default of payment by the plaintiff in equity of the residue of the balance, at the time appointed by the master, the bill should be dismissed with costs[i].

In suit against owner, on master's charter-party.

But where the charter-party is entered into by the master, in a certain penalty for the performance of the covenants, this binds the owner no further than to the amount of the penalty: and the merchant cannot take or detain the ship for any damages he may sustain by breach of the covenants in the charter-party, or for deviation or barratry. The master alone is liable for that, and not the owners; for otherwise masters would have the absolute dominion of the ships of their owners. It seems however that equity will give relief against any demand of the owner for freight, to the extent of the penalty in the charter-party between the master and merchant, for breach of the master's covenants, though no further[j]. In the case cited, the master chartered the ship with the merchants to perform a certain voyage, and bound himself in a penalty, and also the ship for the performance of the voyage; but the owners were no parties

[i] Forward v. Duffield, 3 Atk. 555. [j] Anon. 2 Chan. Cas. 238. *Et vide ante*, 198, 9.

parties to the contract. The master deviated from the chartered voyage, and committed barratry, whereby the cargo (which consisted of fish) became spoiled, and the merchant lost the benefit of the voyage. The merchant's factor obtained sentence for this against the master and the ship, in a foreign court of admiralty; and the ship coming to the merchant's hands, the owner brought trover for it, and another suit for the freight. Whereupon, to stop these suits, and obtain a deduction for the damage sustained by the master's breach of the articles, the merchant filed a bill in Chancery[l]. The chancellor decreed, that if the plaintiffs in the action for the freight recovered more than the penalty in the charter-party, the execution should be restrained to that sum. But as to the action of trover, no order was made, but that the defendants might recover as much as they could in that action, and make use of the depositions of such witnesses as were dead, or could not attend the trial[m].

Chancery will decree bills of lading to be delivered, to owner of West India produce.

If a party be entitled, upon his becoming of age, to the produce of a West India estate, a court of equity will decree the bills of lading of consignments previously made, to be delivered up to him. In the case of Hovey and Blackman[n], the Master of the Rolls said, he remembered a very strong case applicable to this point, which went before the House of Lords[o]. All consignments were to be made by trustees

[l] Anon. 2 Chan. Cas. 238. *Et vide ante*, 198, 9. [m] Betsworth *v.* Clerk, Fin. Rep. 435. S. C. [n] Hovey *v.* Blackman, 4 Ves. jun. 609. [o] Beckford *v.* Beckford, *Id.*

tees in the West Indies to the defendant; and in consequence, they made the consignments to his house here, and sent him the bills of lading. The court thought that as soon as the plaintiff came of age, he had a right to these consignments. The moment he came of age, he sent out orders to stop the produce, which was consigned to the other house; and he filed a bill to compel the defendant to deliver up the bills of lading. Lord Thurlow thought the defendant was bound to deliver them over, and had no right to the consignments; which decree was affirmed in the House of Lords, though it was thought a very harsh demand of Mr. Beckford against his brother[p].

[p] Beckford v. Beckford, 4 Ves. jun. 609.

CHAPTER

CHAPTER XIII.

OF THE REMEDY IN THE ADMIRALTY COURT.

Contents of chapter.

HAVING considered the remedy at common law and in equity, to enforce the performance, or obtain damages for the non-performance of charter-parties of affreightment, it occurred to the author that it might be useful to state the rules by which the admiralty courts are governed in allowing or refusing freight, &c. in prize causes, especially as the decisions of those courts are frequently resorted to in the courts of common law, in actions upon charter-parties; and the construction of these instruments frequently comes in question in the courts of admiralty. It was thought better to bring the admiralty cases together, rather than to mix them with the points of common law, considered in the previous part of the work; that the general principles upon which the admiralty courts proceed, might be seen in one distinct and systematic point of view. The cases are numerous; and the judgments in them given with that profound knowledge, and elaborate attention, which demanded more than a bare statement of the points decided. In this chapter

chapter it is therefore proposed to be considered, first, where freight *is, in general,* adjudged to be due by the admiralty law on capture, in consequence of the performance of the original voyage, or the intent of the parties being fulfilled, or the equity of the claim being made out; and herein it will be proper to state where, and by what means, re-loading of the goods can or cannot be compelled; and the difference, if any, where the prize interest is in the crown or the captors. It will then, in the second place, be considered, where freight *is not,* in general, allowed in the admiralty courts, on account of the original voyage not having been performed, notwithstanding an advantageous sale of the goods in this country; or on account of the freight's being made payable on a condition precedent, not performed; or in the event of the ship's return to the port or country of her departure; or being brought in and detained in consequence of an embargo, which it seems is a ground for disallowing freight, although war may be expected with the country to which the goods are consigned; though it may be otherwise, if that event was in the contemplation of the parties. The chapter will be concluded with some observations as to what is, by the admiralty law, a forfeiture of freight once earned.

Where freight is due on capture, by the admiralty law; if the voyage be performed.

It is a general rule of the admiralty law, that when the contract is executed, by bringing the cargo to its place of destination, the captor, to whom the vessel is condemned, shall be entitled to the freight which has been earned. He stands in the place of the owner of the ship, and is held entitled to the price of the services which have been performed in the execution of the contract. In some instances, it may prove disadvantageous

vantageous to the claimant; and it is certainly a clear inconvenience, in all cases, to be obliged to receive the goods under the process of a prize court, subject to the expences which may have been incurred, or the delay of further proof, instead of taking them, with more facility, in the course of their original consignment. But on the same principle, the court declines, on this side also, to enter into a minute estimate of these circumstances, which must in every case branch out into particulars of infinite variety. It constructs a general rule on the same grounds of presumption which it assumes on the other side; and decrees freight to be paid to the captor, in the same manner as if the goods had been delivered under the original consignment[a]. As to the advantages or disadvantages which the claimants may have sustained, the court enters not into such considerations, and for the reasons stated. It is not in the habit of doing it, in any of the cases falling under the general rule which has been mentioned. Indeed, the parties are, in a great measure, estopped from averring that the arrival in this country is not beneficial to them, by having framed their application on a previous averment of their wish; and final determination to have brought the produce hither, if they had not been restrained. They must be presumed to have formed this determination, on a view of all the advantages and disadvantages that were likely to proceed from it. As to what may be said of the delay or expence of obtaining possession through litigation, those inconveniences are not more than may be imputed to other cases falling under the general rule.

It

[a] *Per* Sir Wm. Scott, 5 Rob. 71, 2.

It cannot be expected that the merchant, in time of war, should obtain possession of his goods seized, with exactly the same convenience as he would have done under the original consignment, in time of peace, and when none of the accidents of war could intervene to interrupt the delivery[b].

Or the intent of contract be fulfilled.

So where the parties obtain restitution in their own country, and in the very port which they would have elected if they had not been diverted by over-ruling necessity, then, although the goods were destined to be delivered in another country, under the original contract, freight is due[c]. In the case cited, the claims were given in by persons of this country, on a representation, that the goods were going on a destination which was obtruded on them by the narrow policy of Holland; and that having themselves elected this country, as the most eligible one for importation, they were compelled to send their goods to Holland, though with the final intention, on their own parts, to have the goods remitted either in specie or in proceeds to this country, as that to which they would immediately have consigned them, if at liberty so to do. This fact was held to form the material and fundamental basis of the rule for the allowance of freight, in such cases; for although the voyage had not been precisely that described in the contract, it was that which the parties themselves would have elected, if not prevented, and diverted by the over-ruling policy of the foreign country[d]. For these reasons, and not because the result in coming to this country might have been more beneficial

[b] *Per* Sir Wm. Scott, 5 Rob. 73. [c] Diana, 5 Rob. 67. [d] *Id.* 72, 3.

neficial to the parties, but because their intention, as they had themselves stated it, had been substantially fulfilled, and the goods had been delivered to their possession, in the very country to which they would have wished them to have come, freight was pronounced to be due[e]. Sir William Scott in this case said, that although he would not enter minutely into the question of whether the delivery was to the advantage or disadvantage of the owners of the goods, he could not but observe that they had received restitution in their own ports, under their own eye; and the delivery had been in London, a port which had been the great depot of articles of the kind for some years, and might therefore be supposed to be eminently beneficial[f].

Or it be due in equity.

So in the case of the American ships, bound to France or Holland, which were brought into the ports of this country under the prohibitory law, the full freight was pronounced to be due, where the owners of the cargoes elected to sell here: where they did not elect to sell here, the court left it to them to settle the freight with the owners of the ships. They considered a voyage from America to this country very nearly the same in effect, as a voyage to those contiguous countries to which the vessels were originally destined. In all probability, the markets of this country were not less favourable than the blockaded ports; and no doubt, the sale was effected with every attention to the interests of the owners of the cargo. In those cases, the court gave the master the full benefit of the freight, not

[e] Diana, 5 Rob. 74, 5. [f] *Id.* 73.

not by virtue of his contract, because, looking at the charter-party in the same point of view as the courts of common law, it could not be said that the delivery at a port in England was a specific performance of its terms. But there being no contract which applied to the existing state of facts, the court found itself under an obligation to discover what was the relative equity between the parties[g].

Reloading, cannot be compelled after unlivery.

If the captor, who succeeds to the right of both ship and cargo, take out a commission of, and obtain an unlivery of the cargo, the contract of affreightment ceases from the time when the unlivery takes place; from which time, the vessel acquires a right to proceed, and it is by accident of restitution only that she continues where she is, without proceeding from thence. That accident cannot have the effect of reviving the contract, where it has been before dissolved. The act of unlivery is binding on the parties, and must be taken as decisive in producing a complete dissolution of the contract. The owner of the cargo cannot afterwards come back on the vessel, and demand to have the cargo taken on board again, and carried to her original port of destination[h]. In the case cited therefore, the court, having decreed freight to be a charge on the cargo, and both ship and cargo being ultimately restored, decreed freight to be due on separation of the ship and cargo, and refused the claim of the owner of the latter to have the goods again taken on board, and carried the remainder of the voyage: although it was urged on the part of the owners

[g] 1 Edw. 247. [h] Hoffnung, 6 Rob. 231.

owners of the cargo, that the claimant of it had apprized the master before the goods were unladen, that they would be speedily restored, and that he would be called upon to complete the voyage; and offered to make him an additional allowance for his time[i]. It was said in the argument, by the advocates on the part of the ship-owners, that if it was intended to suspend the execution of the commission of unlivery, it should have been by application to the court to supersede the former decree; and that the actual demand that the ship should complete the voyage, was not made till long after the unlivery of the cargo[j].

Proper clause for providing against this event.

This rule may, indeed, operate with considerable hardship on the owners of cargoes. But the proper and only remedy for that inconvenience seems to be, to insert a special provision for such accidents in the charter-party. Rules of law, being in their nature general, must in particular instances sometimes operate with inconvenience. That inconvenience has been the cause of introducing many special covenants into bills of lading, and other commercial instruments[k]. In some cases, charter-parties have contained a clause specifying the time which the vessel shall be bound to wait, for the purpose of carrying on the cargo, in case of capture and subsequent restitution[l].

Where the prize interest is in the crown.

In the case of the Diana, where freight was claimed on cargoes taken before hostilities, and brought to this country, having been destined to another under the

[i] Hoffnung, 6 Rob. 232. [j] *Id.* 233. [k] *Per* Sir W. Scott, 6 Rob. 234. [l] *Id.* note.

the original contract, something was thrown out in argument, as if the case of the British proprietors was to be more favourably considered, because the seizure being prior to hostilities, the prize interest did not vest in the immediate captors but in the crown, and because the captors might expect to receive ample remuneration from the bounty of the crown. But it was held, that whether the condemnation of the ships passed to the crown, or to the captors, could make no difference. The claimants would have the same right against the private captors, as against the crown, and no more. They would have a right to restitution of their property, under the relief which had been afforded them by the special instructions of the crown. Whether the freight was to be considered as a part of their property, was the question to be determined. That having accrued by right of war to another, it was not their property under these instructions, neither were they at liberty to argue on any conjecture, as to what the liberality of the crown might give the individual captors; whether the whole, or what proportion, being a matter with which they had no concern[m]. In the case of the Fortuna, where the claim for freight was on the part of the crown, Sir William Scott observed, that it was upon a supposed right of the captor, for whom the crown was substituted, and whose right was derived from the owner of the captured vessel. He said it was possible that under certain circumstances, the crown might not succeed to all the rights of the captor, and still more possible that the captor might not succeed

[m] 5 Rob. 70, 1.

ceed to all the rights of the owner of the captured vessel[n]. But in a subsequent case of two Danish ships, freight was given to the crown as succeeding to the rights of the hostile ship-owners; though not decreed prior to the breaking out of hostilities, and bail had been substituted for the corporal possession of the cargo[o]. In such case however, the admiralty court will allow the owners of the cargo to deduct from the freight decreed to the crown, monies advanced to the master to enable him to prosecute the voyage[p].

Where freight is not in general due on capture: if the voyage be not performed.

One general rule applicable to the question whether freight is due on capture of the ship is, that if goods are not carried to their original destination, within the intention of the contracting parties, freight shall not be allowed; and on this ground, that the contract not being completed, either in substance or form, the speculation of the party has not been carried into execution. The benefit of the contract is lost; and the party has to provide another vehicle, to carry on the goods to the port of their destination. In some cases indeed, it may happen that the port to which the goods are brought may prove more beneficial, and afford a better market. But the court does not enter into the minutiæ of such calculations, which would be attended with great trouble in the inquiry, and much uncertainty in the result. It takes the presumption arising from destination only, and founds upon it the general rule,

[n] Fortuna, 1 Edw. 56, 7. [o] Prosper and Holstein, *Id.* 72. [p] Constantia Harlessem, *Id.* 232.

rule, that in such cases the claimant shall receive restitution of his goods, without the burthen of freight[q]. In the case of the Etrusco[r], which was cited in that of the Diana, though restitution was obtained in this country, yet the original voyage not having been performed, the Lords of Appeal rejected the claim for freight. The ship had come from the East Indies, almost to the port of her destination, which was Ostend. The claimant was a Swiss gentleman of the name of Constant, who was brought hither solely in consequence of the capture, and who was afterwards induced to settle in this country by circumstances of a private and domestic nature. That case therefore bears no real resemblance to the case of the Diana. It would have been precisely a parallel case, if by any physical possibility, the ship and goods could have gone to Switzerland; or if the parties could and would have sent them there, if not obstructed by the authority of a hostile power. If either of these cases could have happened, will any body say that freight would not have been decreed? In that particular case, the Court of Appeal would not enter into the subsequent history of the claimant; though a good deal of commisseration mixed itself with the considerations on which that judgment was formed[s]. In Mr. Constant's case, there was no original intention to sell the goods here, but they were afterwards sold, and though he had himself fixed his residence in this country, the Court of Appeal did not think that circumstance sufficient to vary the application of the general rule[t].

The

[q] *Per* Sir W. Scott, 5 Rob. 71. [r] Etrusco, cited 5 Rob. 69. [s] *Per* Sir W. Scott, 5 Rob. 74. [t] *Id.* 6 Rob. 272.

Mere advantage of sale in this country is not sufficient.

The possible advantage or disadvantage of an interruption of the original voyage is but an accidental circumstance, to which the court will but slightly attend. It would involve the court in a labyrinth of minute considerations, through which it would be difficult if not impossible to find its way. Sometimes the advantage would be on the side of the vessel, and sometimes on that of the cargo; therefore the mere circumstance of the goods having been sold advantageously for the claimants in this country, and at their request, is of itself no sufficient ground of distinction from the general rule, to support the demand of freight, where the voyage originally contracted for has not been performed[u]. In the case cited, the claim was given in for the freight of goods captured on a voyage from Batavia to Amsterdam, and carried to Liverpool, where they had been restored and finally sold under the permission of a licence; and the demand was founded on a suggestion that they had been sold advantageously for the claimants in this country, and at their particular request[v]. There was no original wish to sell in this country. The cargo was brought in by force to Liverpool; and after restitution the claimants elected to sell there, combining many considerations of farther difficulty and expence, in hiring other vessels to carry it on to Holland[w]. In the case in question, Sir William Scott observed, that the general rule was well known, being founded on very ancient principles of law, that whenever the captor brings the goods to the port of actual destination, he shall be entitled to the freight, on

[u] Vrow Anne Catharina, 6 Rob. 269. Fortuna, 1 Edw. 58. acc.
[v] 6 Rob. 271. [w] *Id.* 272.

on the ground that the contract has been fulfilled; but that in most other cases freight shall not be due, although the ship may have performed a very large part of her intended voyage, and so large a portion, as to raise at first sight an appearance of hardship and injustice in the refusal of freight, and to suggest a doubt whether it might not be a better rule to allow a proportion of it, *pro ratâ itineris peracti.* However it is very certain that such a rule, if fully considered, would be found productive of much practical injustice, and lead to endless litigation and uncertainty, in the discussion of the particular circumstances that would be relied on in every case. The ancient rule of practice, therefore, is one to which the court may be allowed to adhere with much national bigotry. The only exception which has been admitted, is that of the Dutch ships, in which the claimants, being British subjects, who were deeply engaged in bringing their effects from the Dutch islands, had made an affidavit, for the purpose of fortifying their claims, that it was their original wish and intention, that the property should have been brought to this country, but that they had been compelled by the policy of Holland, to accept a consignment to Dutch ports. In these cases, the court did not look so much to the advantage which the claimants had derived, though there might be reason to presume that the destination was not disadvantageous, as to the fact that the delivery was made ultimately in the port of their original election[x]. These cases therefore furnish rather an exemplification of the principle, than an exception from the general rule upon this subject[y].

After

[x] *Per* Sir W. Scott, 6 Rob. 271, 2. [y] *Id.* 1 Edw. 57.

If freight be payable on condition precedent, not performed.

After what has been said upon the subject, it is hardly necessary to observe, that the admiralty court will not decree the payment of freight, where by the express terms of the charter-party, the arrival of the ship is made a condition precedent to the payment, and the ship is captured before her arrival, and re-captured and brought back to a port of the country from which she sailed. The charter-party stipulated that the freighter should not pay any part till the ship's arrival at Halifax, where £500 was to be paid; and that if she arrived safe, and should be taken or lost afterwards, no more should be paid or become due. It was said, that the words "become due" were not in the former part of the instrument; but it is to be remembered that instruments of this kind are not usually drawn up with strict technical precision. The obvious meaning, according to common apprehension was, that no part was to be paid unless the ship arrived at Halifax: which event was prevented by the accidents of war. Sir William Scott was therefore of opinion on the whole, that the court could not, without deviating not only from the settled principle and practice, but from the fair sense of the particular contract between the parties, order any part of the freight to be paid; and he rejected the application for the allowance of it[z].

If ship be re-captured, and brought back to the port, or country of her departure.

Where the ship was captured on her outward voyage, re-captured, and brought to a port of the country of her departure, no part of the freight was given[a]; the bringing back of the vessel being, as it were, a defeazance of every thing that the ship had done

[z] 3 Rob. 186. [a] The Hiram, *Id.* 185.

done towards an accomplishment of the contract; in which respect the case was distinguished from that of Luke and Lyde[b], where the ship had arrived within a few days sail of her destined port. In the case of the Hiram, the ship appears to have been chartered to go on a voyage from Liverpool to Halifax, from thence to one or more of the West India islands, and back to Liverpool. The terms of the charter-party were "that she was to receive a freight of £210 for each month, £500 on delivery at Halifax, in bills of three months on London, and the remainder on the delivery of her returned cargo at Liverpool; with a proviso, that if the voyage was performed in less than six months, freight should notwithstanding be paid for six months certain." This last circumstance tended strongly to shew, that it was not so much the time, as the actual accomplishment of the voyage, which was the material object in the contemplation of the contracting parties. To the same effect there was another clause, respecting the returned voyage, "that if the ship should be lost or taken after sailing from Halifax, no more freight should be due[c]. The ship sailed, and was taken, and afterwards retaken, and brought back to a British port, which was in fair consideration of law, to be considered, as if she had been brought back to her own port. She was brought actually to Plymouth: the distance from which port to Liverpool was so short, in comparison of the whole projected voyage, that it might have been considered, in effect, the same as if she had actually been brought back to Liverpool[d]. On this view of the matter, considering it as the case of a ship brought

[b] 2 Bur. 882, *ante*, 153. [c] 3 Rob. 183. [d] *Id.* 183, 4.

brought to *quasi* the port of her departure, Sir William Scott was of opinion, that the doctrine of freight *pro ratâ itineris peracti* could not be maintained. The registrar stated, that it had not been usual in the practice of the admiralty court to give freight in such cases, and therefore on general principle and practice, it was decreed that the parties were not entitled: but still farther on the particular terms of the contract, it was considered that the demand could not be sustained[e].

If ship only be brought in, and detained on account of embargo.

If an embargo be laid on the ship, which is brought in on that account only, and the cargo be claimed for persons not subject to the embargo, so that the detention is occasioned without any co-operation on the part of the owners of the cargo; which is brought out of its course, and detained on account of the ship, and finally conveyed by another vessel to its market: under such circumstances, it is not liable to the demand of freight[f]. The case cited was that of a Swedish ship, brought in under the embargo on Swedish vessels, on a voyage from Philadelphia to Lisbon. So, where the application was on the part of a Swedish ship, for freight under a charter-party to go from Plymouth to Radstow, there to take a cargo of pilchards for Venice; and when the ship had sailed to Radstow, and taken in her cargo, and proceeded a few days on her voyage, she met with bad weather and became leaky, and returned to Falmouth; and after a few days the Swedish embargo was imposed, and the cargo unlivered and restored to the owners, being British

[e] 3 Rob. 185, 6. [f] The Werldsborgaren, 4 Rob. 17.

British merchants: it was held that no freight was due for the short time she was at sea before her return to Falmouth, which place was so much in the neighbourhood of Radstow that it might be taken as the port of her departure, and the cargo could not wait till the embargo might be taken off; but that if any expences had been incurred by the ship on account of the cargo they must be paid, after reference of the amount to the registrar and merchants[g]. The enquiry is, whether the owner would have been entitled to freight. He could have no right but upon an entire execution of the contract, or such an execution as he could effect consistently with the incapacities under which the cargo might labour. Where such an incapacity on the part of the cargo occurs, he has done his utmost to carry the contract on to its consummation; it is a final execution as to the owner of the ship, inasmuch as it does not lie with him that the contract is not performed[h]. The general principle certainly is, that where a neutral vessel is brought in on account of the cargo, the ship is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo[i]. On the other hand, where the vessel itself is incapacitated, no right accrues to the owner; he can have no right to demand that for which he stipulated only on the performance of his engagement[j]. Therefore in the case of the Danish ships, that were going to Portugal with Portuguese cargoes on board, and were stopped, not on

[g] The Isabella Jacobina, 4 Rob. 77. [h] Fortuna, 1 Edw. 57. [i] *Id.*
[j] *Id.*

on account of the goods, which at that time were entitled to a free passage to Portugal, but on account of the ships which were detained under the embargo, on the commencement of hostilities between this country and Denmark; so that the ship was the subject of detention, and not the goods, which might have gone on: under these circumstances it was held, that the owner of the vessel had no right to say that freight was due, still less had the captor, or the crown[k].

Although war may be expected with the country to which the goods are consigned; if it was not in contemplation of parties.

It was said, that these ships were taken at a time when this country and Portugal were in a state of hostility, or rather of approaching hostility; and it certainly did happen afterwards, that in consequence of the unfortunate predicament in which that country was placed, the goods could not go on; but there was not an existing incapacity upon them at the time of capture; it was entirely owing to the ship that they were prevented from proceeding to the port of their destination. The court of admiralty sometimes looks to the circumstance of an approaching war, where the expectation of such an event appears to have guided the conduct of the parties themselves, when the contract was entered into; and in such cases, it feels itself justified in applying the principles that belong to a state of actual war. But nothing of that kind appeared in the case under consideration; there was no part of the transaction that pointed to such an expectation, and therefore the mere existence of a state of things verging to hostilities between the two countries, was held to be a circumstance which the court could

[k] Fortuna, 1 Edw. 58.

could not take into its consideration: consequently it was pronounced that no freight was due[l].

In the case of a capture, if the ship only is condemned, and the cargo is carried by the captor to its original port of destination, the captor is entitled to freight; on the same principle on which he is *not* entitled, where he does not proceed and perform the original voyage. The specific contract is performed in the one case, and not in the other. The question is, if the contract between the parties has been performed? If it has, the captor who has performed it is, as a matter of right, and of course, entitled to the reward for so doing; although if he has done any thing to the injury of the property, or has been guilty of any misconduct, he may remain answerable for the consequence[m]. If the voyage has been performed, the case then is reduced to a question, whether the captor has done any thing to forfeit the right to freight, which under the general rule he has acquired. In the case of the Fortuna, after the captor had carried the cargo to Lisbon, its port of destination, the consignee was at his own instance put into possession, though informally and apparently without any shadow of right, by the Portuguese government. Being a cargo of corn, it became necessary that it should be sold. The sale took place, and the proceeds were deposited in the hands of a third person, by consent of both parties; and although the captor did not bring in the proceeds so soon as required, it was because they were so deposited. Freight was therefore decreed to the captor[n]. But on an appeal from a sentence

What a forfeiture of freight, or not.

[l] Fortuna, 1 Edw. 59. [m] Vreyheid, Lords, 23d April, 1784. Fortuna. 4 Rob. 274. [n] Fortuna, *ubi suprà*.

sentence of the vice-admiralty court of Jamaica, condemning the ship and cargo, where an application was made to the court for the captor's expences; it being urged against the application, that a monition had issued in the court below for a considerable time past to bring in the proceeds, with which the captor's agents had neglected to comply; the court observed, that the agents having so manifestly neglected their duty, no indulgence could be granted to the captor; and therefore they refused the application, restored the ship and cargo, and decreed an attachment as prayed against the agents[o].

[o] Eliza, 1 Acton, 336, 7.

CHAPTER

CHAPTER XIV.

OF THE REMEDY IN THE ADMIRALTY COURT.

HAVING in the preceding chapter, stated the general rules observed by the admiralty courts in allowing or refusing freight in prize causes, it will next be proper to consider to whom, and on what particular goods, trade, or voyage, freight is allowed by those courts. As to the first point, to whom it may be decreed, it will be found that a neutral, or even an alien if domiciled in a neutral country and engaged in a licit trade, may be allowed freight. Secondly, as to the goods for which freight may be given, the decisions will be stated establishing the rule for the allowance of freight of enemy's goods in neutral ships, and the exceptions to that rule in the case of contraband goods; in which case it will be seen that the ignorance of the master is no excuse. But freight is sometimes allowed for such part of the goods as are restored; and contraband goods may be brought in for preemption, though strict good faith is necessary to entitle the neutral to this privilege. It will be shewn in what cases he may be deprived of his right to freight

Matters of this chapter.

freight by false papers, or spoliation of papers. Some observations will also be made, as to how far the condemnation of the ship is consequent on the condemnation of the goods, where the latter are discovered to be contraband. In considering the third point, viz. on what trade or voyage freight is allowed by the admiralty courts, the decisions of those courts as to giving or refusing it in the coasting and colonial trades will be stated. The chapter will then be concluded, with some remarks as to what is considered evidence of neutrality, and on whom the burthen of proof of that fact lies; what is evidence of the hostile character of the ship, or the trade in which she is engaged; and on the disinclination of the courts to allow frivolous excuses for apparently engaging in an illicit trade.

Person domiciled in neutral country, may trade as neutral.

A neutral is, in general, as much entitled to trade and the profits of trade, as a subject of this country. And a person living *bonâ fide* in a neutral country, though not a native of that country, is fully entitled to carry on trade to the same extent as the native merchants, provided the trade is not inconsistent with his native allegiance[a]. So, though the cargo be the property of the French consul, yet having a mercantile character, he may carry on trade in a neutral country, his mercantile character being unaffected by his consular character; therefore he has a clear right to trade to the same extent as any native merchant[b]. Consequently, he is entitled to the freight and other profits of such trade, where the native merchant would be so entitled.

In

[a] *Per* Sir Wm. Scott, 1 Rob. 302. [b] *Id.* 238, 9.

Freight allowed of enemy's goods in neutral ships.

In general, where a capture is made of a cargo the property of an enemy, in a neutral ship, the neutral shipowner obtains against the captor those rights which he had against the enemy[c]. The principle of this rule is, that capture is equivalent to delivery. But the rule does not hold, except where the captor succeeds fully to the rights of the enemy, and represents him as to those rights. If a neutral vessel having enemy's goods is taken, the captor pays the whole freight, because he represents the enemy, by possessing the enemy's goods *jure belli;* and although the whole freight has not been earned by the completion of the voyage, yet as the captor by his act of seizure has prevented its completion, that act shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight. But if ship and cargo being both neutral are restored, the consequence is only that the ship must proceed on and complete her voyage, before she can demand her freight. If the cargo is restored whilst the ship continues under detention, still less reason is there to contend that she has earned her whole freight[d].

Exceptions to this rule.

This appears to have been the general practice of the British prize courts, in giving or withholding freight to neutral ships; notwithstanding Mr. Schegel's opinion to the contrary, which is sufficiently confuted in a note in the second volume of Robinson's Admiralty Reports[e]. But there are exceptions to this rule, in cases where any circumstance of *mala fides* occurs;

[c] 1 Rob. 291. 296. [d] The Copenhagen, 1 Rob. 291, 2. [e] 2 Rob. 304, 5, *notis*.

occurs; as, where the ship is engaged in a contraband trade, or there is a fraudulent fabrication or spoliation of papers to deceive our government; or she has drawn upon herself the loss of freight, as a penalty for some departure from pure neutral conduct, though it may not, according to the practice of the laws of nations, have made the vessel liable to condemnation[f]. Such are the cases where the ship is engaged in the enemy's coasting trade, colonial trade, or other prohibited traffic; in which cases, freight and expences are constantly refused, on condemnation of the cargo to the captors as enemy's property. These several cases will be distinctly considered.

If goods be contraband.

Formerly, by the law of nations, the carrying of contraband articles of war worked a forfeiture of the ship; but in modern practice in the admiralty court, except where the contraband articles belong to the owner of the vessel, or the case is attended with particular circumstances of aggravation, the penalty has been mitigated to a forfeiture of freight and expences, which are, in general, refused to be allowed in the case of contraband goods[g]. If an enemy puts on board a neutral vessel a contraband cargo belonging to himself, and that cargo is taken, it is condemnable to the captors; and the court of admiralty will not enforce the payment of freight against the captors, although the ship-owner might have just reason to demand it from the enemy, with whom his contract has been performed as far as he has not been disabled from fulfilling it, by the very circumstance of the other

[f] 2 Rob. 304, 5, *notis*. [g] The Mercurius, 1 Rob. 288. The Sarah Christina, *Id.* 242.

other contracting party having put a cargo of that species on board, which exposed the vessel to hostile seizure; and the court may, in like manner, not conceive itself bound to say, in other instances, that the captors are liable to the charge of freight, although it may be a valid demand against the owner of the goods to be settled elsewhere[h].

If the cargo be contraband, the neutral master cannot be permitted to aver his ignorance of that fact; for he is bound in time of war to know the nature of his cargo. If a different rule could be sustained, it might be applied to excuse the carrying of contraband goods in all cases[i]. In the first of the cases cited, it was suggested by the master, not only that he was ignorant of the contents of the cargo, but that he was under a special agreement indorsed on the bill of lading not to open the packages; but notwithstanding this circumstance, freight for the goods condemned was refused. They consisted partly of sail-cloth, which was described as linen[j]. **Ignorance of master, no excuse.**

In the above case, other innocent articles, belonging to proprietors not implicated in the contraband part of the cargo, were restored, and freight for those was allowed to be a charge upon that part of the cargo, the ship and goods having been separated[k]. **Freight allowed of innocent goods restored.**

In the practice of the court of admiralty, there is a relaxation which allows the carrying of contraband articles, being the produce of the claimant's country; it **Contraband goods may be brought in for pre-emption.**

[h] *Per* Sir William Scott, The Emanuel, 1 Rob. 296, 7. [i] Oster Risoer, 4 Rob. 199. Baltic, 1 Acton, 25. [j] *Id.* [k] *Id. Et vide post*, 280, 1.

it having been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which may constitute so considerable a part of the native produce and ordinary commerce of the neutral country. But this relaxation is understood with a condition, that the goods be brought in for pre-emption; no unfair compromise, as it should seem, between the belligerent's right, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility.

Strict *bona fides* necessary to entitle neutral to this privilege.

To entitle the party to the benefit of this rule, a perfect *bona fides* on his part is required[l]. If it be asked, why should a real destination to French ports be concealed, if the neutral has a right avowedly to carry contraband goods? the answer is, to give the French market a greater security. If pitch and tar are going avowedly to the enemy, they may be brought in for pre-emption; but if paper sholding out a neutral destination are put on board, this right is eluded, and the enemy is commodiously and securely provided with the instruments of war. The cruizer can only examine to satisfy himself of the fact of the destination; but he cannot detain without a responsibility in damages. The false representation therefore is not useless for the purposes of mischief, it is the passport and convoy for noxious articles to the ports of the enemy[m]. Therefore a cargo consisting of contraband articles, and going to the enemy's ports with false papers,

[l] Sarah Christina, 1 Rob. 241. Charlotte, 1 Acton, 201. [m] 1 Rob. 241, 2.

papers, under a total absence of that fair conduct which ought to be maintained in order to entitle it to the benefit of the more favourable rule, is subject to condemnation[n].

False papers deprive him of it. Affidavit of ownership. Charter-party. Bills of lading.

If the master's affidavit state that "the claimant is the lader, and he believes the owner," it seems to be an insufficient manner of verifying the property of a cargo, which is asserted to belong to his own owner. And where, amongst the papers which described the property, there was a charter-party as formal as any could be, drawn by a broker, whose signature was authenticated by a magistrate, those circumstances were held to negative the idea of the ship and cargo belonging to the same person. It may perhaps not be uncommon for a person owning both to have something of a charter-party, for the purpose of keeping distinct accounts of the respective profits of his ship and cargo. But the mere purpose of a man's keeping such accounts does not in any degree explain the above circumstances. And if the broker's name be the same with that of the French vice-consul who attests some of the documents, such a circumstance, though much too slight of itself to lead to any conclusion, yet connected with other circumstances, may suggest some thing of a presumption that French interests are concerned, particularly if it turns out that the real destination of the cargo is to France[o]. It is perfectly inconsistent with the good faith of true neutral conduct, if the bills of lading purport a false destination, and give a false representation of the property[p]. It is also a general

[n] 1 Rob. 242. [o] *Id.* 238. [p] 1 Rob. 124, a.

neral and clear principle, that one partner shall be affected by the fraud of another; therefore where the master is a part-owner, the other part-owners must answer for his conduct[q].

Papers alone are no proof.

Papers alone make no proof, unless supported by the depositions of the master. Therefore where the bill of lading expressed the shipment to have been on account and risk of neutral merchants, but instead of supporting the contents of his papers, the master deposed that on arrival, the goods would become the property of the French government; the bills of lading were not regarded, but the cargo was condemned as enemy's property. In the case alluded to, all the concealed papers strongly supported the master in his testimony[r].

Spoliation of papers forfeits freight.

So it has been held, that freight is forfeited by spoliation of papers; and that the owners are responsible for the acts of their master, though they are at a great distance and no way privy to the act; for though it may be hard in many cases, yet men must abide the consequences of their own misplaced confidence[s].

Where ship condemned because of goods.

With respect to the ship, if the admiralty judge be satisfied that the vessel and cargo belong to the same person, he is bound to condemn that also; upon the ordinary rule, which extends the penalty of contraband to all the property of the same owner, involved in the same unlawful transaction. But in one case the ship was restored, though strong doubts were entertained whether the cargo was not in fact the property

[q] 1 Rob. 124, a. [r] The Atlas, 2 Rob. 299. [s] Rising Sun, 2 Rob. 104.

perty of French agents, and it was suspected to be a French speculation throughout. Giving the owner of the ship the benefit of these doubts, Sir William Scott said, was perhaps practising a lenity which would require more apology than upon strict principle might be easily furnished. However the ship was restored; withholding, as usual on the carriage of contraband, the allowance of freight and expences[t].

Freight not allowed to neutral vessel, taken in coasting trade of enemy.

If a neutral ship be taken in the coasting trade of the enemy, she is not entitled to claim against the captor, to whose prejudice such trade is carried on, the same rights which she possessed against the claimant, whom she is assisting to carry it on, as, freight and expences; upon the principle, that it is contrary to the duties of a neutral character to afford that assistance. For, in the eloquent language of Sir William Scott, it may be asked, " Upon what ground is it that a ship can claim freight against the captor, on a voyage undertaken for the peculiar accommodation and relief of the enemy, under the distress to which the successful hostilities of the captor's country has reduced him? Is there nothing like a departure from the strict duties imposed by a neutral character and situation, in stepping in to the aid of the depressed party, and taking up a commerce which so peculiarly belongs to himself, and to extinguish which was one of the principal objects

[t] Sarah Christina, 1 Rob. 242.

jects and proposed fruits of victory? Is not this, by a new act, and by an interposition neither known nor permitted by the enemy in the ordinary state of his affairs, calculated to give a direct opposition to the efforts of the conqueror, and to take off that pressure which it is the very purpose of war to inflict, in order to compel the conquered to a due sense and observance of justice? Is this so clearly within the limits of impartial and indifferent conduct, that if a neutral ship be taken in an office of this kind, she shall be entitled to claim against the captor, whom she is thus counteracting, and almost defrauding, the very same rights which she possessed against the claimant, to whom she is giving this extraordinary and irregular assistance[u]?" Supposing the coasting trade to be a traffic not usually opened to foreign vessels, it may again be asked, "Can there be described a more effectual accommodation to an enemy during war, than to undertake it for him during his own disability? Is it nothing, that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said that this is not importing any thing new into the country, and it certainly is not; but has it not all the effects of such an importation? Suppose that the French navy had a decided ascendancy, and had cut off all British communication between the northern and southern parts of this island, and that neutrals interposed to bring coals from the north for the supply of the manufactures, and for the necessities of domestic life, in this metropolis; is it not impossible to describe a more

[u] *Per* Sir William Scott, 1 Rob. 298, 9.

more direct and a more effectual opposition to the success of French hostility, short of an actual military assistance in the war[v]."

In the case of the Emanuel, it was urged that in several instances, the court of admiralty had decreed payment of freight to vessels employed in the coasting trade of the enemy; but Sir William Scott said, he believed that such cases passed under an intimation of the opinion of the very learned person who preceded him in which the parties acquiesced, without resorting to the authority of a higher tribunal. And the case of the Mercurius[w] before the Lords, in which freight was refused, seemed to convey a different opinion, as to the coasting trade of the enemy[x]. That opinion is conformable to more ancient judgments upon the subject, that neutrals are not to trade on freight between the ports of the enemy. To this principle, therefore, Sir William Scott said he should adhere, leaving the party to such remedy for his freight as he should think fit to pursue; either against the captor, by appeal in this country, or against his freighter, in the country where he was employed[y].

Cases on the subject.

Freight and expences are not allowed against the captors of neutral vessels taken in the general coasting trade of the enemy, *a fortiori* it is refused, if the vessel be employed in the enemy's revenue service. In the case of a ship sailing under Danish colours, and taken with a cargo of salt on a voyage from Cadiz to Castropel in Gallicia, whilst this country was at war with

A fortiori freight is disallowed, if vessel employed in enemy's revenue service.

[v] *Per* Sir Wm. Scott, 1 Rob. 300, 1. [w] 1 Rob. 302, a. [x] 1 Rob. 301, 2. [y] *Id.* 302.

with Spain, the ship was restored, reserving the question of freight and expences. The cargo had been condemned as the property of the king of Spain; and the question was, under these circumstances, whether freight and expences should be allowed[z]. The ground upon which it was contended that the freight was not due to the proprietors of the vessel was, that she was a Danish ship employed in the transmission of Spanish goods from one Spanish port to another, and so carrying on the coasting trade of the country[a]. And Sir William Scott, in giving his judgment observed, that the case under consideration was not merely that of a neutral assisting the enemy, in carrying on a trade which it was the interest of this country to prevent, but it was a direct assistance in the revenue service of the enemy. The king of Spain, disabled from employing Spanish vessels in the collection of his revenues, enlisted foreign vessels under that necessity. Salt was a royal monopoly in Spain, as it formerly was in France; and it was distributed, on the government account, to the various provinces. This foreign ship was employed in the distribution, and by that employment became an actual revenue-cutter of the king of Spain. It should seem to be no very harsh treatment of such a vessel, if on the capture she was restored, and left to pursue her demand of freight against her original employers[b].

The foregoing principle applicable to the colonial trade.

In the case of the Emanuel, it was said in argument that this principle, which applied likewise to the colonial trade between the mother countries and their plantations

[z] The Emanuel, 1 Rob. 296. [a] *Id.* 297. [b] *Id.* 301.

plantations in the West Indies, (that being equally a trade guarded by a monopoly in time of peace, and having been likewise occasionally relaxed under the pressure of a war,) had been in a good measure abandoned, in the decisions of the lords commissioners of appeal. But Sir William Scott, in his judgment, said he was not acquainted with any decision to that effect; and he doubted very much whether any decision had given even an indirect countenance to this supposed dereliction of a principle, apparently rational in itself, and conformable to all general reasoning on the subject[c]. "The general principle (said Sir William Scott) I take to be entire and untouched, so far as it relates to the trade of the colonies[d]." In the case of an American ship, taken on a voyage from Surinam to Amsterdam (22d April, 1796) with a cargo of colonial produce, on a motion for allowance of freight and expences to the neutral ship, Sir William Scott declared, he should in no case of this sort, of direct trade between the colony and the mother country, give freight, until he was instructed so to do by the superior court[e]. There have since been other cases decided to the same effect[f]. So, in the case of trade between the port of one enemy and the colony of another enemy allied in the war, freight is not given. Therefore in the instance of an American ship, going from Amsterdam to Guadaloupe, with an assorted cargo claimed on behalf of American merchants, it was held, that the circumstance of the trade being to the colony of a different enemy, did not form a solid distinction; and it would be impossible to maintain the

[c] 1 Rob. 299. [d] *Id.* 300. [e] The Rebecca, 2 Rob. 101. [f] Nancy, 3 Rob. 82. Anne, *Id.* 91, note.

the rule of law applicable to cases of this nature, without applying it also to this extent; therefore freight was refused[g]. But in the case of the Manilla, the order in council of 11th November, 1807, restricting trade with the enemy's colonies, was held not to extend to ports or places in St. Domingo, not in the possession or under the dominion of the enemy; and therefore the ship and cargo were restored, and the captors' expences allowed[h]. And in the case of the Mercurius, the interposition of a British port was held to take the voyage out of the meaning of the order of the 7th January, 1807. The vessel was coming from an enemy's port, and destined ultimately to Bremen, but first to touch at a port in this country for a licence to proceed: which was deemed sufficient to break the continuity of the voyage, and prevent the order from attaching[i].

Aliter, if trade be permitted in peace.

It is certainly true, that in the last war many decisions took place, that a trade between France and her colonies was not considered as an unneutral commerce. But under what circumstances? it was understood that France, in opening her colonies during the war, declared that this was not done with a temporary view relative to the war, but on a general and permanent purpose of altering her colonial system, and of admitting foreign vessels, universally and at all times, to a participation of such commerce. Taking that to be the fact (however suspicious its commencement might be, during the actual existence of a war), there was no ground to say, that neutrals were not carrying on

[g] The Rose, 2 Rob. 206. [h] Manilla, 1 Edw. 1. But see Immanuel, 2 Rob. 186. [i] Mercurius, 1 Edw. 53.

on a commerce, as ordinary as any other in which they could be engaged; and therefore in the case of the Virwagtig[k]; and in many other succeeding cases, the lords decreed payment of freight to the neutral ship-owner. It is fit to be remembered on this occasion, that the conduct of France evinced how little dependence can be placed upon explanations of measures adopted during the pressure of a war; for hardly was the ratification of peace signed, when she returned to her ancient system of colonial monopoly[l].

Or, be authorized by public treaties.

In the present war, it does not appear that any judgments of the supreme court of admiralty have receded from the general principle above mentioned; except in cases, and under circumstances, in which a respect to public stipulations and treaties required that the application should be limited.

Freight allowed, on voyage from port of one enemy to port of another, &c.

But the rule, of not giving freight to neutral ships engaged in the coasting trade of the enemy, has not been applied to voyages from the port of one enemy to the port of another. There have been cases in which the court has given freight on such voyages, where there have not appeared any fraudulent or false proceedings in the conduct of the ship; and voyages of this kind are very distinguishable from others, in which freight is refused, because the parties have engaged in the coasting trade of the enemy, though it was peculiarly and exclusively his own. For this sort of traffic, from one enemy's port to another, has always been open; and is, in its very nature, subject to the uses

[k] 1 Rob. 300, a. [l] *Id.* 299, 300.

uses of all mankind who are not in a state of hostility with him. The Dane has a perfect right, in time of profound peace, to trade between Holland and France, to the utmost advantage he can make of such a navigation; and there is no ground upon which any of its advantages can be withheld from him in time of war. Therefore in the case of a Danish ship, taken on a voyage from Havre to Amsterdam, 23d July, 1799, on a motion for freight and expences, they were allowed[m].

Onus probandi lies on neutral.

It was observed by Sir William Scott, in the case of the Emanuel, that in this country it has been long the system, that the coasting trade should be carried on by our own navigation; and in all the rage of novel experiment, that has dictated the commercial regulations of France in its new condition, this policy is held sacred. It stands enacted by a decree of 21st September, 1793, that no goods, the growth or manufacture of France, shall be carried from one French port to another in foreign ships, under pain of confiscation. The same policy has dictated the commercial system of other European countries: in the ordinary state of affairs, no indulgence is generally permitted to the ships of most other countries to carry on the coasting trade[n]. The *onus probandi*, therefore, lies on neutral claimants, to shew that the trade in which their vessels have been engaged on the enemy's coasts was not a mere indulgence, and a temporary relaxation of the coasting system of the state in question; but that it was a common and ordinary trade, open to the ships of

[m] The Wilhelmina 1 Rob. 101, note. [n] *Per* Sir Wm. Scott, 1 Rob. 297, 8.

of any country whatever[o]. If a neutral be engaged in the coasting trade of an enemy, the presumption is that she is engaged in a commerce, which, according to the general trading system of the enemy's country, she could not pursue, and that it was pursued in consequence of the pressure to which the commerce of the enemy has been reduced by the arms of this country[p].

The court of admiralty has never gone so far as to say, that pursuing one voyage in the coasting trade of the enemy will be sufficient to fix a hostile character; but it seems that a habit of such trading would. Such a voyage must raise a strong suspicion against a neutral claim; and the plunging into a trade so highly dangerous creates a presumption that there is an enemy proprietor, lurking behind the cover of a neutral name[q]. The neutral destination of the ship, though held out in all the papers, is discredited by the fact of her being taken going into an enemy's port[r]. In the cases cited, provisional instructions were elaborately framed, for the event of the ship's being carried into any belligerent port, in which case the master was empowered to sell the whole of his cargo, or even to offer it to the government for sale; in short, the event of her delivering the cargo in a belligerent port was as minutely provided for, as if no other port had ever been in the contemplation of the parties. But the case does not appear to have been decided upon this circumstance. The great fact was, that the vessel was taken going into Cherbourg.

What is evidence of hostile character of ship, or trade.

The

[o] *Per* Sir W. Scott, 1 Rob. 298. [p] *Id.* [q] *Id.* 124. [r] The Sarah Christina, 1 Rob. 239. America, 3 Rob. 36. S. P.

Want of water not allowed as an excuse.

The explanation given by the master was, that the ship was obliged to put into that port for water. But Sir William Scott in his judgment observed, that the experience of the court of admiralty had not taught it much respect to such explanations, generally; and the circumstances of that case fortified the result of that experience[s]. Two circumstances in particular were mentioned by the learned judge, as weighing much with him. The ship had left her port of Udivalla on the 8th of November, and she was seized on the 17th of the same month. She had therefore been only nine days from her port of clearance, when the supposed necessity, arising from the failure of water, commenced. Now that a ship, meaning *bonâ fide* to go from Udivalla in Sweden to one of the southernmost points of Europe, should either not lay in more water than was sufficient for nine days use, or should not secure that water in a sufficient manner with relation to the length of such a voyage, is highly improbable. The master said, he took in eighteen casks at Udivalla, that six were emptied by use and leakage, and some of the remainder were leaky; and the mate echoed this account to a letter. But the boatswain knew nothing of the matter, for he swore that the course was altered to go into Cherbourg; he could give no account why it was so altered, though it was most extraordinary that such a necessity as was pretended should exist on board the ship, and yet be unknown to the crew, or at all events to the boatswain who was a sort of officer[t]. It was said that if the truth of the excuse was doubtful, there might have been a commission of inspection. But that

[s] The Sarah Christina, 1 Rob. 239. America, 3 Rob. 36. S. P.
[t] *Id.* 240.

that it seems would prove nothing; for if there was a fraud intended, it would be natural for the parties to take care that the state of the casks should not detect it. They would be emptied of course. Therefore this could have given no satisfaction; nor were there any means by which it could have been satisfactorily proved that there was no fraud, the existence of which appears to have been sufficiently demonstrated by all the circumstances[u].

Such excuses generally disallowed.

Neutral masters should take notice, that where the fact of a deviation into an enemy's port is clearly proved, it will be no easy thing to purge away that fact by explanation; for in the nature of the thing, the explanation must generally come from themselves only, and therefore from a quarter exposed to suspicion arising from the fact itself; the general inclination of the court will therefore be (though subject to reasonable exception) to take the clear fact against the dubious explanation[v].

[u] The Sarah Christina, 1 Rob. 239. America, 3 Rob. 36. S. P.
[v] *Id.* 240, 1, and see America, 3 Rob. 37.

CHAPTER

CHAPTER XV.

OF THE REMEDY IN THE ADMIRALTY COURT.

Contents of chapter.

IN this remaining chapter on the remedy for freight, &c. in the admiralty court, it is proposed to consider, first, where the whole of the freight, &c. is allowed, and where part only; at what rate it is calculated where allowed, and how far it is preferred to other expences; 2dly, where demurrage is, or is not given; and 3dly, by whom the expences of unloading trans-shipment and repairs are to be borne; the power of the master to contract for such expences, and to hypothecate the ship, her tackle or cargo; the nature of general and particular average, and how they also are borne. But the principal subjects of enquiry will be the two first, respecting freight and demurrage; less being said upon the third, as not being so immediately connected with the subject of charter-parties.

Where the whole freight is due on capture and re-capture.

The admiralty court will sometimes decree payment of the whole freight on capture and re-capture, though the voyage has not been performed[a]. A ship was

[a] The Hamilton, 3 Rob. 107. The Martha, *Id.* 106.

was chartered to go from Liverpool to St. Martin's, and on to Lisbon for a cargo of fruit; and the master not finding a full lading there, he consented to take in wine, out of accommodation to the owner of the cargo; the ship was captured on her return voyage, but was afterwards re-captured and brought to Falmouth. The outward voyage had been entirely performed, and a great part of the return voyage, solely in the service of the freighters. The master was taken out of the ship on the first capture; owing to which circumstance, no claim was immediately made for the cargo. The owner of the ship being dead, the care of the vessel devolved on his administrator; but no blame was imputable to him, that he did not interfere with respect to the cargo. The ship was restored on the 2d of July, but no claim was given in for the cargo till the 17th of that month, and restitution did not pass till the 16th of November; the cargo was litigated, and it was by no means clear that it would not be condemned. The agents for the ship disposed of her without waiting the result. Under these circumstances, it was held that the ship was entitled to her whole freight[b]. It would have been unreasonable to require the ship which had been restored, to wait the result of the proceedings against the cargo, when it was by no means clear that any cargo would remain to be carried on. A party indeed is not to act in an hasty manner, and to run away immediately on the restitution of his ship. Something is to be conceded in the way of accommodation; a reasonable time is to be allowed, and if it is not allowed, a proportion of the freight

[b] The Racehorse, 3 Rob. 101.

freight may be deducted. But it cannot be said that a ship shall wait an unlimited time, for the mere chance of taking on the cargo, if eventually it should be restored. Nor can it be contended that the contract is dissolved or abandoned by the ship-owner or his agents, who are ready to carry it into effect, but are discharged from the further execution of it, by the inability of the owner of the cargo. The owner of the ship may therefore avail himself of such discharge from the contract, and yet be entitled to the benefit of it[c].

Necessity of clause providing for these events.

It was observed by Sir William Scott in the case of the Racehorse, that it is much to be regretted that charter-parties do not contain provisions for the case of capture and re-capture, which is an accident that frequently occurs, and it is extremely natural, that some provision should be made for it; yet in almost all charter-parties it seems to have been as much out of the consideration of the parties, as if there had been no such thing as capture[d].

If ship and part of cargo be lost, by negligence of prize-master.

The demand of freight is an absolute demand, in cases where the ship is pronounced to be innocently employed: and where the ship, having been lost by the negligence of the prize-master, was decreed to be restored in value, with freight to be a charge on the cargo, which was ultimately condemned for want of further proof, and the freight was reported by the registrar and merchants at £1000, and the proceeds of that part of the cargo which was saved amounted only

c 3 Rob. 105. d *Id.* 104.

only to £600; on a motion for an attachment against the captor for the balance, it was held that the captor was liable for the whole freight, and not merely to the extent of the proceeds of that part of the cargo which was saved; for the freight must be taken as having become as much the property of the neutral claimant as the ship itself, the captor having taken it *cum onere*. The seizure was perfectly justifiable; the ship had been sent in under proper orders, but unfortunately those orders were improperly executed. If the loss had happened by accident only in bringing in the ship, the captor, having made a justifiable seizure, would not have been liable to any restitution, either for the freight or the ship; but the contrary had been pronounced by the court. And the freight was as much a part of the loss as the ship; for the captor was bound to answer equally for both, having taken possession of the cargo, which was a security for the freight[d].

If captor improperly carries the ship to a remote port.

So, in the case of a Swedish vessel, loaded with wines and a quantity of dollars, which was captured on a voyage from Teneriffe to London the 23d of April 1805, and carried into a remote port (Barbadoes) where the vessel and part of her cargo, consisting of the wine and some dollars, the private property of the master, were restored, and the remainder of the dollars condemned; the high court of appeals, considering capture as delivery, so as to entitle the owners of the vessel to freight, condemned the captors to the payment of it, as if the wines had been completely loaded

[d] Der Mohr, 4 Rob. 314.

loaded and delivered pursuant to the charter-party. They moreover pronounced freight to be due upon the dollars condemned in the court below, which were proved to have been taken on board by the captain, to the consignment of British merchants, under a stipulation in the charter-party by which the cabin was reserved to the captain's sole use; though the licence had, it seems, been procured for the express purpose of exporting the wines[e].

Where part only is due. Sale of part of cargo decreed, to discharge freight.

Where the cargo, being of a perishable nature, becomes insufficient to pay the freight, under particular circumstances application may be made to the court, on the restitution of the ship with freight, to decree the sale of so much of the cargo, as may be necessary to be sold for the discharge of the freight[f],

Where captor not liable for freight, beyond proceeds of cargo.

Where the ship is restored by consent, with freight decreed to be a charge upon the cargo, and that is afterwards restored, but the proceeds are insufficient to pay the freight, the admiralty court will not decree the captor to pay the balance of freight to the ship, and also to account for the value of the cargo to the proprietor[g]. In the case cited, it happened that after the restitution of the vessel (which was a Dane) she sustained some injury by the embargo on Danish ships. Greater expences might probably have been incurred on that account; but however that might be, it was held that the court could do no more than carry into effect

[e] Catharina Elizabeth, 1 Acton, 309. [f] Vrow Margaretta, 26th February, 1802. Clarissa, 28th December, 1799. 4 Rob. 304, note. [g] The Haabet, 4 Rob. 302.

effect the decree which had been made, by ordering the proceeds to be paid to the neutral master; and that if he had any further demands, they must be prosecuted against the consignee[h].

Salvage, where deducted from the freight.

In the case of the Racehorse, it was prayed on the part of the owners of the cargo, that one-eighth of the freight might be deducted for the salvage, which they had paid on the freight. It was said on the other side, that the owner of the ship had settled with the re-captors for salvage; but it was held that salvage was due for the ship, cargo, and freight[i]. Where vessels have performed their outward voyage, and broken ground, though still lying in the harbour of their outward-bound port at the time of capture, they are to be deemed *in itinere*, in the course of earning their freight, and salvage is as clearly due on the freight as if they had been captured at sea. Where there are two distinct voyages, as is sometimes the case in charter-parties, distinguishing the outward from the homeward voyage, the salvage may be divided; but where a ship goes out under a charter-party to proceed to her port of destination in ballast, and receive her freight only on her return, the court is not in the habit of dividing the salvage; and in that case, salvage is due upon the whole freight[j].

Where a moiety of freight was decreed.

The court of admiralty, like the courts of common law, sits not to make or alter, but to expound and give effect to contracts between parties[k], but yet it has

[h] The Haabet, 4 Rob. 302. [i] 3 Rob. 106. [j] Progress, 1 Edw. 223, 4. [k] *Ante*, 97.

has an equitable jurisdiction; it considers itself bound, as well as it can, to provide for that situation of interests which may unexpectedly take place in the course of a transaction, and produce a state of things out of the contemplation of the contracting parties. Such was the case of a British vessel, which had been chartered at Campeachy, for the purpose of delivering a cargo at Lisbon. The ship had successfully prosecuted her voyage to the very entrance of the Tagus, when she was warned off by the blockading squadron. Upon receiving this intimation, she continued for some days with the fleet; but, a gale of wind coming on which blew her out to sea, she was picked up by a Spanish privateer, but was soon afterwards re-taken by a British cruizer, and carried to Madeira, where the ship and cargo were sold by the re-captors, to pay the salvage. A claim was given for the ship, and cargo, which was decreed to be restored, and the question was, what freight was due under the circumstances of the case? On the part of the owner of the vessel, it was contended that the whole of the freight was due, as the ship had actually gone up to the mouth of the port to which she was destined. On the part of the owner of the cargo, it was urged that no freight was due, as the goods were not delivered according to the terms of the charter-party[1]. The case was marked with peculiar misfortune, because after the ship had been stopped by the blockading force, she was blown out to sea, and being subsequently taken out of the hands of the master, she was carried by the re-captors to a distant port, and there

[1] Friends, 1 Edw. 246.

there sold, together with her cargo, at a great disadvantage. Loss therefore was unavoidable, and the only question was, upon whom the weight of it should fall[m]? If the incapacity of completing the voyage can be exclusively attributed to one of the parties, it is proper that the loss should fall upon him; but where the loss arises from the common incapacity of both, equity suggests that it should be divided between them. The calamity in this case was common to both; for both ship and cargo were equally affected by the blockade. The ship could not have entered the port in ballast, any more than the cargo could have entered it in any other vehicle. The loss arose from the common incapacity of the one as much as of the other. Under these circumstances it was decreed, as the equity of the case suggested, that the loss should be divided; and the court, accordingly, directed a moiety of the freight to be paid.

Where freight *pro ratâ itineris*, only.

In a case not merely or originally a matter of prize, but of a mixed nature, where the completion of the voyage is prevented in consequence of the distressed and doubtful character of the ship, the maxim that capture or seizure is equivalent to delivery does not apply. Thus, where the ship, having originally come into port in distress and in want of repairs, was detained after the cargo was restored, for the purpose of proving her neutral character; and being unable to prosecute her voyage, part of the cargo was sent to London, and part was put on board other ships to proceed on the original destination; one question was, whether the freight

[m] Friends, 1 Edw. 248.

freight was due for the whole voyage, or only *pro ratâ?* for it was admitted that some freight was due, as the ship had brought her cargo from Smyrna, the most considerable part of the voyage. But the completion of it having failed from the distressed state and doubtful character of the ship, it was held that she had not earned more than a freight *pro ratâ itineris;* which therefore the registrar and merchants were ordered to ascertain in the usual manner[n].

Charter-party generally, but not always the measure of freight.

The charter-party is not the measure by which the captor, in all cases, is bound, even though there be no fraud in the contract itself. When, by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not necessarily bound to that increased rate of freight. When no such circumstance exists, and a ship is carrying on an ordinary trade, the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owners of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subject to extraordinary risk and hazard, from its connection with the events of war, and the redoubled activity and success of the belligerent cruizers[o]. So, where the price of freight is much enhanced, by a mode of navigation arising out of particular speculations of interest, ships engaging in such hazardous trade are not at liberty to charge the captors with the rate of freight, which they might under very honest intentions, have contracted to receive from the owner of

[n] The Copenhagen, 1 Rob. 291, 2. [o] Twilling Riget, 5 Rob. 85, 6.

of the cargo[p]. In the case cited, the course of trade in which the ships were employed was as little entitled to be favourably considered as any could be, since they had been engaged in a species of traffic wholly unknown, before that time, namely, to convey to Europe the produce of the Dutch settlements of Batavia, sold under a contract which the court had already pronounced illegal[q]. After such a decision, it could not but have been considered as an adventure of some hazard, to send ships on this new and experimental trade, which was in effect to put the freighter in the place of the Dutch East India Company. The owners would naturally look for their indemnification in an advanced freight, in terms which might not be in any degree unfair or unreasonable between the parties, considered as the premium of a voyage eminently hazardous on account of its illegality, being against the rights of this country. The freighter also might look for his indemnification to the Dutch East India Company, in the price at which he had obtained the contract, in consequence of their distress. Considerations of this nature might render it a real and fair contract between the parties; but the freight, as a burthen upon the English captor, does not come loaded with all these considerations, none of which apply to him[r].

General rule of preference of freight to other expences.

Freight is, in all ordinary cases, a lien which is to take place of all others. The captor takes *cum onere*[s]. It is the allowed privilege of the neutral trade to carry the property of the enemy, subject to its capture and to the temporary detention of the vessel; and if the party does

[p] Twilling Riget, 5 Rob. 84. [q] *Id.* 84, 5. [r] *Id.* 86. [s] Bremen Flugge, 4 Rob. 90.

does not prevaricate, or conduct himself in any respect with ill faith, he is entitled to his freight, in all cases of ships carrying on their ordinary commerce[t].

Exception in trade between the ports of allied enemies.

But this general rule is nevertheless liable to be altered by circumstances; and there is one class of cases to which it ought not to be applied, that is, the case of ships carrying on a trade between the ports of allied enemies; a trade, which may be said to arise in a great measure out of the circumstances of the war, though not altogether because such a trade exists in a limited degree in times of peace. In such a course of trade, although the admiralty court has not altogether refused freight to the neutral ship[u], yet it is not deemed unreasonable that the captor should in preference be entitled to his expences, inasmuch as the nature of such a trade cannot but very much influence the judgment which he must unavoidably form, of his duty to bring in the cargo for adjudication[v].

Between two belligerents.

Where the voyage is not between the ports of allied enemies, but between the ports of two belligerents, that constitutes a sort of middle case, with respect to the obligation by which the captor might conceive himself bound to bring the cargo to adjudication. There might be a presumption, undoubtedly, that the property belonged to the enemy exporter; but there is a foundation also for presuming that it might belong to the consignee, and that it would not have been sent on a destination to this country, but under the protection of a licence. It is therefore a case of a mixed nature, to

[t] *Per* Sir William Scott, Vrow Henrica, 4 Rob. 347. [u] *Ante*, 287. [v] 4 Rob. 347.

to which a court of admiralty applies a sort of middle judgment, by allowing the captor his law expences, and directing the other expences to be postponed to the payment of freight[w].

Demurrage, where given.

The admiralty court will order demurrage to be paid by the captor, where there has been a neglect to proceed to adjudication; especially, if there appears to have been any misconduct on the part of the captor, indicating an intention of carrying the vessel out of the jurisdiction of the court of admiralty[x], and no precipitation or attempt to throw an unjust odium on the part of the claimants. A ship was captured on the 13th of November, 1796, and carried into Shields; the claim was given in on the 23d of December, and no proceeding having been instituted by the captors, in April 1799 the claimants took out a monition against them to proceed to adjudication, on a suggestion that there was an intention of removing the vessel from Shields to Scotland. No appearance was given for the captors till the 26th of February, when they consented to restitution, on an application to the admiralty court, that the claimants might be allowed demurrage; and the court held it to be clearly due. It was accordingly referred to the registrar and merchants to fix the proportion; the court observing, that such conduct might call for more than a mere reparation in damage[y].

Although

[w] *Per* Sir William Scott, Vrow Henrica, 4 Rob. 348. The Corier Maritimo, 1 Rob. 287. [y] *Id.*

Perhaps payable, though voyage prevented.

Although the freight be made payable on the arrival of the ship, and that is prevented by capture on her outward voyage, and her being brought back to the port or country of her departure, in which case no freight is due[z]; it is not so clear that this will prevent a claim for demurrage, if the vessel suffer any delay or improper detention on her taking in her outward cargo. In the case of the Hiram, Sir William Scott seems to have considered this as a possible, though not a probable event. There, the ship was captured, and brought back after recapture, and no part of the freight allowed; the vessel took in her lading at Liverpool; whether she suffered by any delay or not does not appear; no complaint was made that she was improperly detained, and it is not likely that she should have been so, as it was equally for the interest of the ship and cargo that every thing should be forwarded with all possible dispatch[a].

Where not: if ship driven in by stress of weather, &c.

Where a ship is not captured at sea, but seized in a British port, into which she has been driven by stress of weather, and wanting repairs, she stays there for that purpose as well as for the purpose of proving her neutral character, and proof of the character of the ship takes up more time than that of the cargo, there is no ground for a claim of demurrage, against the seizors or the owners of the cargo[b].

If reasonable ground for suspicion of her character.

And although the court of admiralty restore the vessel and cargo, as acting under the protection of his majesty's licence, the high court of appeals will not allow the costs and damages sustained in consequence of

[z] *Ante*, 262. 266. [a] 3 Rob. 183. [b] The Copenhagen, 1 Rob. 289.

of her detention, if she appears to have been navigated in such a way as to give reasonable ground of suspicion to the captors, that she was about to make an enemy's port not included in the licence[c], and carry on an interdicted trade with the enemy. In such a case, their lordships not only confirmed the decree, refusing such damages, but condemned the appellants in the costs of the appeal[d].

Duly documented is altogether a relative term; for a vessel may be duly documented in one case, by papers which would not be sufficient in another. Thus in ordinary cases, a neutral ship would be duly documented by a pass from the government of the country to which she belongs, and other usual papers: but if she appears to have been bought in an enemy's country during the war, a bill of sale would be necessary, and that duly verified and supported. If the vessel be duly documented, but is seized merely on account of the cargo, and the ship be thereby prevented from completing the voyage, there is no reason for the ship-owner to lose any part of his freight. But the case is very different if the voyage is not completed owing to the ship not being properly documented, in which case the owner cannot be entitled to his full freight, or at any rate to more than he has earned for freight, *pro ratâ itineris*. If the ship be detained for further proof of her character after the cargo is restored, it cannot be said that the detention is merely on account of the cargo[e].

If she be not duly documented.

A master,

[c] See the Twee Gebroeders, 1 Edw. 95. [d] Saint Antonius, 1 Acton, 113. [e] The Copenhagen, 1 Rob. 289.

Power of master to contract for such expences, &c. and to hypothecate the ship or cargo.

A master, under circumstances of necessity, has a general right to hypothecate either the ship or cargo, or to sell the latter, or throw any part of it overboard. In the case of the Copenhagen the ship had come in originally in distress, and wanting repairs it became necessary to take out the cargo. There being no warehouses at hand, it was put on board three other vessels, which very reluctantly engaged in the service, and were finally induced to do so by a written contract with the master. These vessels were obliged to perform quarantine on account of the cargo coming from Smyrna; and they were also damaged by the bad state of the commodities, which consisted of cotton. And it was held, that the master had a right, under such circumstances of necessity, to bind both the owners of the ship and cargo by his contract for their benefit[f]; and that if it could not be impeached by fair imputation of negligence, or treacherous abandonment on the part of the master, or by that of gross extortion on the other side in an hour of distress, it was binding on the owners, and ought to be maintained to its full extent. The *quantum* of the demand of the owners of the three vessels were, with this intimation from the court, left to the registrar and merchants[g].

Laws of Oleron and Wisby on this subject.

With respect to the master's power to pledge or dispose of the goods, it is provided by the laws of Oleron and Wisby, that "if any vessel happen, through misfortune, to be cast away, and the mariners save part of the lading, the master shall allow them a competency to

[f] The Copenhagen, 1 Rob. 292, 3. [g] *Id.*

to get home to their own country. And he may lawfully pledge to some honest person such part thereof as may serve for that purpose[h]." Again, "when a merchant freights a ship, loads her, and sends her to sea, and the ship comes into an harbour, where she is detained by contrary winds till her money is all spent, the master in that case should speedily send to his own country for money; though he ought not to lose a good opportunity to continue his voyage, for if he do, he is accountable to the merchant for all damages that may happen thereby. But the master may take part of the wines or other goods, and dispose of them for the present occasion; and when the ship is arrived at her port of discharge, the wines disposed of shall be valued and appraised at the same sum as the other wines are commonly sold for, neither more nor less; and the master shall have the freight of such wines as he has disposed of[i]. If indeed the ship happen to be lost, the master must make good to the merchant his merchandize, and not expect any freight for the same[j]." With respect to the master's right to sell or pledge the ship or tackle, the same laws provide, that "the master cannot sell the vessel in a foreign port, to procure provisions or other necessaries, without a procuration or special order for that purpose from the owners. But in case he wants money for the necessary provisions of the vessel, he may, for that end, with the advice of his mariners, pawn or pledge part of the tackle[k]. Neither is it lawful for the master, in general, to sell the cordage without the merchant's leave. He is bound to preserve the whole as far as in him

[h] Leg. Ol. 3. [i] *Id.* 22. Leg. Wis. 35. 45. 69. [j] Leg. Wis. 68.
[k] Leg. Ol. 1.

him lies[l]. He cannot sell the ship nor any of the tackle without leave of the owners; though if he be in want of provisions he may pledge part of the cables and cordage; but that must be done with the advice of the mariners[m]." The laws of Oleron and Wisby are frequently quoted, and relied on in the admiralty courts. They are indeed more adapted to questions on the admiralty law than those arising in the common law courts of this country, which proceed wholly on the principles of the common law, except where, as in some instances, the principle of the marine or admiralty law has been adopted by the common law judges.

Expences of unloading, trans-shipment, and repairs, by whom to be borne.

Where a ship, having sustained damage at sea, comes in for repairs, and appears to be unfit to perform the functions for which she is engaged, viz. to contain and convey the cargo, it would be very unreasonable that the owners of the vessel should claim the expences of repairs from the owners of the cargo, and at the same time not pay any part of the charges of trans-shipping and conveying the goods the rest of the voyage. The expences severally may be matter of simple average, or the whole may be matter of general average[n]. In the case of the Copenhagen, just quoted, one question was, whether the owners of the ship, who had brought the goods from Smyrna, or the owners of the cargo, were responsible for the compensation due to the owners of the three other ships, and also for the repairs of the vessel, and other charges. The trans-shipping, or rather the unloading of the goods, seems to

[l] Leg. Wis. 15. [m] *Id.* 13. [n] Copenhagen, 1 Rob. 293. *Et vide post.*

to have been for the common benefit of the ship and cargo; for it was necessary to unload the ship as well for its own repair, which had become indispensable, as for the preservation of the cargo. Therefore the expence of that trans-shipment, or rather of the unloading, seems to have borne the character of a general average, though possibly (it was said) it might be hardly worth while to consider the unloading as a charge distinct from the trans-shipment, and if so, it should seem to have belonged to the cargo only. The expences of conveying the cargo to its ultimate destination was held to belong to that only, the contract having been in effect determined by the payment of freight *pro ratâ itineris.* As to the expence of repairs, it was held that there was no ground to charge the cargo with that, because the ship and cargo being completely separated by the determination of the contract, and new vehicles provided at the expence of the cargo, the latter was not answerable for those repairs, which it in no degree occasioned. But it being intimated that there was a general rule prevailing in such matters, the court declared, that if there was any thing like a law merchant on the subject, it should be referred to the registrar and merchants to inquire respecting the existence, and generally reserved authority of such a rule of practice; and if it should be found to exist, to apply it in ascertaining the sums to be borne by the ship and cargo, subject to the further opinion of the court. The registrar and merchants accordingly ascertained such sums (without allowing interest) at the following rates, which do not appear to have been altered by the court, viz. for the first of the three vessels, being a sloop of 85 tons, for 39

weeks at £5 *per* week; for the second, being a brig of 160 tons, for 41 weeks at £10 *per* week; and for the third, being a sloop of 61 tons, for the same period at four guineas *per* week[a].

General and particular average, what, and how borne.

General average is for a loss incurred, towards which the whole concern is bound to contribute *pro ratâ*, because it was undergone for the general benefit and preservation of the whole. Particular or simple average (which is not a very accurate expression, though sufficiently understood, and received into familiar use,) means damage incurred by one part of the concern, which that part must bear alone; so that in fact it is no average at all. General average is that loss to which contribution must be made by both ship and cargo; the loss, or expence which the loss creates, being incurred for the common benefit of both, as, if for the preservation of the ship and cargo, it should be necessary to cut down and cast overboard a mast. This happens in cases of sudden peril, and is caused voluntarily. But particular average is by common accident, and involuntary. The loss of an anchor or cable, or the starting of a plank, may be matters of simple or particular average, for which the ship alone is liable. Should a cargo of wine turn sour on the voyage it would be a matter of simple average, which the goods alone must bear. There also might be a simple average, for which each would be severally liable, under a misfortune happening to both ship and cargo at the same time, and from a common cause; as, if a water spout should fall on a cargo of sugar, and a plank,

[a] 1 Rob. 294, 5.

plank, from the same violence, should start at the same time[p].

The provisions of the laws of Oleron and Wisby as to general average losses on the goods, are as follow: "When a ship is overtaken at sea by a storm, so that she cannot escape without casting some of her goods overboard, for lightening and preserving the ship and crew, with the rest of the lading, the master ought to inform his ship's company that it is convenient so to do; and if there be no merchant but who gives his consent, or approves thereof by his silence, then the master shall, according to his own discretion, cast overboard some part of the lading. If the merchants disapprove of it, the master nevertheless ought not to forbear casting out such goods as he shall see convenient; he and the third part of his mariners making protest of the necessity for so doing. And the wines or other goods cast overboard ought to be valued, according to the value of the goods saved; and when these are disposed of, the price thereof shall be divided, liver by liver (as it is called) among the merchants: and the master ought to make the division, and compute the damages of the vessel or the freight, at his own choice. And to repair the damage sustained, the mariners also ought to have a tun free, and another by lot, according as it shall happen, if it appear that he, to whose lot it may fall, did the part of a good and able seaman; otherwise he shall be barred of his privilege. And the merchant may, as to this fact, put the master to his oath[q]. The master, upon the casting of goods overboard,

Laws of Oleron and Wisby, on this head.

[p] 1 Rob. 293, 4. *Per* Sir Wm. Scott. [q] Leg. Ol. 8. Leg. Wis. 20 1. 38, 9.

overboard, shall pay his share of the goods so cast, either to the full value of the ship, or of the whole freight, as the merchant shall think best, and the merchant to the value of the merchandize saved: but so that the merchant shall be free (if he pleases) to take the ship, at the same rate as she has been appraised by the master[r]. If any one in the ship has money, or other valuable commodity in his chest, he is bound to declare it before the casting, and by so doing, he shall be paid for such commodities to the full value thereof; and, for his money, (it is said) he shall have two deniers for one[s]. If he take the money out of his chest, and carry it about him, he shall pay nothing[t]. If the chest be cast overboard, and the owners thereof do not declare what is in it, the chest shall be looked upon as empty, nothing but the wood and iron work (if there be any) coming within the reach of the contribution[u]. The following are the different provisions made by the above laws in case of an average loss on the ship and tackle. If the master, by reason of foul weather, thinks fit to cut away the mast, he ought first to call together the merchants, if there be any on board the ship, and apprise them of the necessity of so doing, to preserve the ship and lading; and if they will not consent, it may yet be done by the mariners. If for this purpose they are obliged to cut cables and rigging, leaving the cables and anchors behind them, the damages shall be computed the same as in the case where goods are cast overboard. When the vessel arrives at the port intended, there should be protest made. Then the merchants shall pay to the master, without any delay, their

[r] Leg. Wis. 40. [s] *Id.* 41. [t] *Id.* 42. [u] *Id.* 43.

their shares or proportions of the loss, or sell the goods or pledge them, or procure money to satisfy the same, before the goods are taken out of the ship. And if, after he has made the division, there happen controversies and differences, the master must not suffer by the loss, but ought to have his freight[v]. If a mast, sail, or any part of the ship's tackle be lost by misfortune, the ship being under sail, or otherwise, it shall be the master's loss; but if the master be forced to cut it away, in that case, the ship and her lading shall make it good[w]."

[v] Leg. Ol. 9. [w] Leg. Wis. 12.

PART

PART II.

ON

BILLS OF LADING.

CHAPTER I.

OF THE NATURE AND FORM OF THE INSTRUMENT; ITS SEVERAL PARTS; AND THE INDORSEMENT THEREOF, &c.

Subject, how considered in the following chapters.

WE have seen that in the case of chartered ships, the contract of affreightment frequently refers to, and (as it were) incorporates in its provisions, those contained in the bills of lading. In the case of general ships, these bills are, in most cases, the only evidence of any express contract between the parties, as to the duties and responsibilities incurred by the master or owners of the ship, as well as the rate of freight, demurrage, or other charges to be paid by the shippers of the goods. It therefore seemed that a work on contracts of affreightment would have been incomplete, unless it had embraced the consideration of these instruments; which will be the subject matter of the remaining part of this book; and as the property in the

the goods is usually transferred by them, their operation in that respect will also be considered in the course of the following chapters.

Contents of this chapter.

In this chapter, it is proposed to state, first, what is the nature of a bill of lading, and the form and effect thereof; how far the terms of it, after they are once settled, may be varied by the freighter or supercargo; the difference between a bill of lading and a charter-party; when such bills should be signed, and the propriety of taking a previous receipt for the goods: secondly, the several parts of a bill of lading; what number is necessary, how they are made and distributed, and the effect of each: thirdly, the nature of the indorsement; the difference, or rather the distinction, between a general and special indorsement; for what purposes it may be made; the effect of it, in general, and where it is made to bind the net proceeds of the goods only, in case of arrival; the materiality of the time of the signature or indorsement and delivery of the different parts of the instrument, in common cases, and in the case of an indorsement by and to a factor. Some observations will be made at the conclusion of the chapter on the question, whether payment of the freight be a condition precedent to a transfer of property by the bill of lading; how far the invoice binds the property; the necessity of a letter of advice; and the effect of an agreement to assign the goods at sea, without an indorsement or delivery of the bill of lading.

Bill of lading, what. And of the form and legal effect thereof.

A bill of lading is an acknowledgment by the captain of having received the goods loaded on board his ship[a]. It

[a] *Per* Buller, J. 2 T. R. 75.

It has also been defined to be the written evidence of a contract for the carriage and delivery of goods sent by sea for freight. The instrument is in effect not only a contract of affreightment, but a contract of bailment also. By the delivery on board the ship, the master acquires a special property, to support that possession which he holds in the goods of another, and to enable him to perform his undertaking. The general property remains with the shipper, until he has disposed of it, by some act sufficient in law for that purpose[b]. In the usual form of the instrument, the undertaking is to deliver to the order or assigns of the shipper[c]. But bills of lading are not drawn in any certain form. They sometimes do, and sometimes do not express on whose account and risk the goods are shipped. They often, especially in time of war, express a false account and risk[d]. Beawes observes, that bills of lading not only contain an acknowledgment of the receipt of the goods, and stipulate for the delivery to the order or assigns of the shipper, but they usually state the goods to have been shipped by the persons named, in good order and well conditioned, and that they are to be delivered in like good order and condition, at the place to which they are consigned; which obliges the captain to make such a delivery[e]. Hence also, bills of lading are likewise called bills of consignment. Formerly, the only exception contained in bills of lading was against the perils of the seas; but in late times, captains and ship-owners have, most wisely and properly, extended the exception to the acts of God, the king's enemies,

[b] *Per* Lord Loughborough, C. J. 1 H. B. 359. [c] *Id.* [d] *Id.* 361.
[e] Beawes, 142.

mies, fire, and all other dangers and accidents of the seas, rivers and navigation. In these instruments, as in charter-parties, it is necessary to make express exceptions from liability in all cases of extraordinary peril[f].

Effect of advertisement of general ship.

When a vessel is intended to be employed as a general ship, it is said to be usual, in London and other places, to give notice of such intention, by advertisement of printed papers or cards, mentioning the name and destination of the ship, her burthen, and force if she be armed, and expressing whether she is to sail with any and what convoy, and other matters relating to the voyage; which advertisement is understood by merchants as an assurance or warranty to the shipper, and becomes a part of the contract with him, although it be not afterwards contained in the bill of lading[g]. However it is yet an undecided point, whether the mere expression in such an advertisement, "to sail with convoy," where there is no warranty or stipulation about convoy in the bill of lading, means any thing more than that the ship was intended to sail with convoy[h]. Perhaps, the usual and received construction of such an advertisement as the above might be fairly left to the jury, if it be not altogether superseded by the subsequent express contract evidenced by the bill of lading.

Voyage, &c. how far it may be varied by shipper, or supercargo, after it is once fixed.

We have seen, that where the voyage is once fixed, and bills of lading are accordingly signed by the master,

[f] *Ante*, 98. [g] Rinquist *v.* Ditchell, *M.* 40 *G.* 3. Abbot, 224, b.
[h] Snell *v.* Marryat, *M.* 48 *G.* 3. *Id.* 644, 5. *Ante*, 48.

ter, the freighter cannot alter it; at all events, without calling in the bills of lading, or offering sufficient indemnity to the captain[i]. We have also seen, that if the time for commencing and finishing the voyage be once settled, it cannot be altered by the supercargo, without special authority for that purpose[j]. But delivery at a port appointed by the freighter's agents, though not named in the bill of lading, is sufficient to entitle the ship-owner or captain to recover the freight[k]. And a supercargo, unless specially restrained by the freighter, has authority to alter the destination of the cargo, or the course of the voyage, within the limits of the charter-party. He may be considered the freighter's agent for that purpose; and if the master makes delivery of the goods according to the ultimate orders of the supercargo, that will bind the freighter[l]. There does not seem to be any power however in the freighter or his agents, to alter the contract evidenced by the bill of lading, after it is once signed by the master, so as to affect his liability on that contract, without his consent. The acceptance of any indemnity against such liability must be altogether in his discretion.

The difference between a bill of lading and a charter-party (says Beawes) is, that the former is required and given for a single article or more, laden on board a ship that has sundry merchandize, shipped for sundry accounts; whereas a charter-party is a contract for the whole ship[m]. In another place, Beawesobserves, that the charter-party settles the agreement of carriage, as the

Difference between a bill of lading and a charter-party. When the bills should be signed; and of taking a receipt for the goods on shipment.

[i] *Ante*, 20. [j] *Ante*, 49. [k] *Ante*, 78. [l] *Id.* 79. [m] Beawes. 142.

the bills of lading do the goods to be carried, and binds the master to deliver them well conditioned at the place of discharge, according to the agreement[n]. He further says, that bills of lading ought to be signed by the master within twenty-four hours after the delivery of the goods on board. But upon the delivery of the goods, the master, or other person officiating for him in his absence, is to give a common receipt for them, which is to be delivered up upon the master's signing the bills of lading[o]. However, it is by no means true that a charter-party always is, or necessarily must be a contract for the whole ship, any more than that a bill of lading is only given where there are several articles or descriptions of merchandize shipped on different accounts; the former may be for the whole or part of the ship[p], and the latter may be where all the goods on board are of the same sort, and shipped on the same account, and the whole ship is occupied by them. The advice of Beawes to take a receipt for the goods on delivery, if the bills of lading be not then signed, (which of themselves are receipts,) is dictated by prudence; as it frequently happens that they are not signed till long after the time he mentions, though there is no fixed time within which the signature of them must take place; and a written acknowledgment will prevent all dispute about the quantity and quality of the goods delivered, which are usually marked before delivery; but the evidence of a witness is equally good, if it could be as well depended on. The bills of lading, when signed, being the regular evidence of the shipment of the particular goods enumerated

[n] Beawes, 133 [o] *Id.* 142. [p] *Ante*, 2.

enumerated in them[p], the quantity, quality and condition, of the articles should be inserted with accuracy; and the marks upon the casks or bales are also usually mentioned, in order to identify the goods in case of dispute. The mention of any other circumstance of identity would answer the same purpose; as, the direction of the goods, or the like. The French ordinance requires that the bills of lading should contain the quantity, quality and marks of the merchandizes, the name of the merchant who loads them, and of the person to whom they are to be delivered, the places of departure and destination, the names of the master and the ship, and the price of the freight[q]. There is the same reason for mentioning the rate of demurrage, and other charges likely to be incurred; which are therefore commonly inserted. It is hardly necessary to observe, that the shipper of the goods is usually called the consignor, and the person for whom they are shipped and to whom they are to be delivered, the consignee.

Of giving up the bill of lading, or demanding a receipt, on delivery of the goods.

Beawes says, that upon delivering the goods at the port of destination, to the shipper's factors or assigns, giving up the bill of lading sent to the factors or assigns is not a sufficient discharge to the master, who may insist upon a receipt[r]. But although this may be the usual course of mercantile dealing, and if it be so, no merchant will in prudence dispute about it, it seems that in strictness a receipt cannot be insisted upon. It is also clear, that before the late stamp acts[s] imposing the duty of giving a receipt on the person receiving

[p] But see Haddon v. Parry, 3 Taun. 303. [q] Liv. 3. tit. 2. *Des Connoissemens*, art. 2. Abbot, 227. [r] Beawes, 142. [s] See 43 G. 3, c. 126, s. 5.

receiving a money payment, the demand of a receipt on that occasion could not, in general, have been legally enforced[1]; and there is much less reason to require it in the case of the delivery of goods to the consignee, as the giving up of the bill of lading, though not accurately speaking any discharge to the master, yet is certainly evidence of the delivery of the goods, and just as good evidence of that fact as an express written acknowledgment of the receipt of them would be. Hence it appears, that if the bill of lading be delivered up, or ready to be delivered, on the one hand the master will not be justified in detaining the goods, and if he detain them, he will subject himself to an action of trover; and on the other hand if he do deliver them, and the other party will not give him a receipt, he has no remedy whatever, by action or otherwise, to compel him to give one, or for his not giving it. Indeed it is not by any means clear, that the master can even insist on the delivering up of the bill of lading; and it seems a mistake to suppose, that the consignee will or can be obliged always to deliver it, as he may want it, in order to obtain redress against the master or owners, if the terms of it be not complied with, by a safe and complete delivery; about which he cannot inform himself, till he has opened and examined the packages. Besides, the master may take a person with him, to witness the delivery; which will render any written evidence of the fact unnecessary.

How many bills of lading made out, &c.

According to Beawes, there must always be three bills of lading made out: and in England they are to be

[1] Cole v. Blake, Peake's Rep. 179.

be on stamped paper, otherwise they are invalid[u]; or rather, incapable of being produced in evidence. Of these three, one should be remitted by the first post after signature, to the person or persons to whom the goods are consigned; the second remains with the shipper; and the third, made out on unstamped paper, is given to the master for his guidance, with respect to the different merchandizes he has on board[v]. It is almost universally the practice in trade to make out three bills of lading, as mentioned by Beawes: but there is no absolute necessity for any particular number. The nature of the voyage or transaction, and the interests of the persons concerned, may require a greater or less number than three. Each of them usually containing a clause that the fulfilment of either shall vacate all, no inconvenience can arise from multiplying the copies. Every one of those signed by the captain, and stamped, is an original and complete instrument of itself, like each separate part of a bill of exchange, so as to enable the person entitled, to sue upon it without the rest. It is generally considered, that a delivery according to either of them is a sufficient discharge to the captain; and some have gone so far as to say, that he may prefer which claimant he chooses[w]; but the better opinion seems to be, that he is bound to deliver the goods to him who first becomes the holder of either of the bills of lading, *bonâ fide* and for a good consideration[x], at all events if he has notice of that fact in due time. Although each part or copy of a bill of lading is of itself a separate and complete contract, as

[u] Beawes, 142. [v] *Id.* [w] Fearon *v.* Bowers, H. B. 364, n. [x] Lickbarrow *v.* Mason, *post*.

as to the holder of that particular part; yet all the parts or copies make but one contract as to the master, so that if one be performed, all are so. But yet there is this difference between the different parts of a bill of lading and a bill of exchange, that in the one case the time of delivery, and not of the signature, is important, but not in the other[y].

Indorsement, general or special.

A bill of lading is assignable by the indorsement of the shipper[z]. The indorsement of a bill of lading is simply a direction for the delivery of the goods. This indorsement may be general, that is in blank, not describing or naming the person or persons to whom the delivery is directed to be made, but importing a general direction to deliver them to the *boná fide* holder or bearer of the bill of lading, whoever he may be, who in such case is authorized to receive the goods, and give a discharge to the ship-master; though the holder of such a bill of lading coming into his hands casually, or without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order therefore is a sufficient discharge to the ship-master[a]. The bills seldom, if ever, bear upon the face of them any indication of the purpose of the indorsement[b].

No difference between general and special indorsement.

It was in evidence before Lord Hardwicke, in the case of Snee and Prescott[c], that when agents are in advance

[y] Caldwell v. Ball, 1 T. R. 205. [z] 1 Ld. Raym. 271. 4 Burr. 2051. 1 T. R. 216. 2 T. R. 63. 1 H. B. 359 60 5 T. R. 367. 4 East 217. [a] 1 H. B. 359, 60. [b] *Id.* 361. [c] 1 Atk. 249 See also Brown v. Heathcote, *Id.* 162.

vance for goods bought for their principal, they generally make the bills of lading to their own order indorsed in blank, especially where they are in doubt of the principal's circumstances, that they may by this means have it in their power, if they should see occasion, to vary the consignment. And this evidence appears to have had considerable influence on Lord Hardwicke's opinion in the above case. Indeed it seems to have completely controuled it, and may be considered as that which led to the determination of the case[d]. In Savignac and Cuff, Lord Mansfield at first was of opinion, that there was a distinction between bills of lading indorsed in blank and otherwise; but he afterwards abandoned that ground[e]. And finally in Lickbarrow and Mason it was held, that though the bill of lading in that case was at first indorsed in blank, it was precisely the same as if it had been specially indorsed to the person with whose name it was afterwards filled up; for when it was filled up with his name, it was the same as if made to him alone originally[f]. So that it is now clearly settled, whether the indorsement be general, or special, it makes no difference whatever.

For what purposes indorsement may be made.

One respect in which bills of lading are said to differ essentially from bills of exchange, is, that bills of exchange can only be used for one given purpose[g], namely, to extend credit by a speedy transfer of debts, which one person owes another, to a third person; though bills of lading may be assigned for as many different purposes as goods may be delivered. They

[d] See 2 T. R. 73, *per* Buller, J. [e] 2 T. R. 66. [f] *Id.* 71. [g] Qu.

They may be indorsed to the true owner of the goods by the freighter, who acts merely as his servant; they may be indorsed to a factor to sell for the owner; or they may be indorsed by the seller of the goods to the buyer[h].

Of the effect of the indorsement.

The indorsement and delivery of a bill of lading to a creditor, *primâ facie* conveys the whole property in the goods from the time of its delivery. But if the intention of the parties appear to have been only to bind the net proceeds in case of the arrival of the goods, the indorsement will have no other effect; and an insurance made on account of the indorser, after such indorsement, is good[i]. The case of Hibbert *v.* Carter was cited in that of Lickbarrow and Mason, not as having decided any question upon the consignor's right to stop the goods, but as establishing the position, that by the indorsement of the bill of lading the property was so completely transferred to the indorsee, that the shipper of the goods had no longer an insurable interest in them. The bill of lading in that case had been indorsed to a creditor of the shipper; and undoubtedly if the fact had been as it was first supposed, that the cargo had been accepted in payment of the debt, the position would have been just; for the property of the goods, and the risk, would have completely passed from the shipper to the indorsee; it would have amounted to a sale executed for a consideration paid. But it is not to be inferred from that case, that an indorsement of a bill of lading (the goods remaining at the risk of the shipper) transfers the property,

h 1 H. B. 361. i Hibbert *v.* Carter, 1 T. R. 745.

perty, so that a policy of insurance upon them in his name would be void. The greater part of the consignments from the West Indies, and all countries where the balance of trade is in favour of England, are made to a creditor of the shipper; but they are no discharge of the debt by indorsement of the bill of lading; the expences of insurance, freight and duties, are all charged to the shipper, and the net proceeds alone can be applied to the discharge of his debt. That case therefore has no application to the question of stoppage *in transitu;* but shews that the effect of the indorsement of a bill of lading is regulated by the terms indorsed[j].

Time of indorsement and delivery, and not that of signature, is material.

Where several bills of lading are signed by the captain, different in form, but all substantially to the order of the shipper, it is not material at what time they are respectively signed by the captain; the persons who, for a valuable consideration, first get possession of any of them, with the shipper's indorsement, have a legal right to the consignment[k]. The facts of the case cited were these: Thompson, a planter in Jamaica, and the shipper of the goods in question, corresponded with Fairbrother, a merchant at Liverpool. Thompson was indebted to the plaintiffs, Caldwell and Co. also merchants in Liverpool, in £4000; as a security for which, a mortgage was executed of Thompson's plantations, and a covenant entered into for the future consignment of his sugars. France and Co. also merchants at Liverpool, were likewise creditors of Thompson to the amount of £3000, for money advanced to him through the hands of their agents

[j] 1 H. B. 368. [k] Caldwell *v.* Ball, 1 T. R. 205.

agents in Jamaica, Coppell and Godwin; and to discharge this demand, bills of exchange had been drawn payable to Coppell and Godwin, who indorsed the same to France and Co. On making the consignment in question, the defendant (the master of the ship) signed three bills of lading; two of which, for different parts of the cargo, together making up the whole, were to deliver to the order of the shipper or his assigns, and were indorsed by Thompson as follows: "Deliver the within to Messrs. Thompson and Fairbrother, provided they engage to pay the net proceeds to Messrs. France and Nephew; otherwise deliver them to the order of James France, nephew, on account of Coppell and Godwin." These bills of lading were delivered by Thompson into the hands of Coppell and Godwin. *After this*, the other bill of lading, (which was for the whole cargo, and was admitted to have been the one *first signed* by the defendant, and was to "deliver to Messrs. Thompson and Fairbrother or their assigns,") was also indorsed by Thompson, and then sent by him to Fairbrother, with a letter, acquainting him of his having assigned the two bills of lading to Coppell and Co. for securing the payment of the bills drawn in their favour. Upon receipt of the letter, Fairbrother indorsed this bill of lading to Caldwell and Co. the plaintiffs, who afterwards advanced £219 odd, for the use of Thompson. Upon being required to deliver the goods on payment of the charges for freight, &c. the captain, and France and Co. (who were the owners of the vessel), refused to deliver them, as the plaintiffs would not engage to pay the net proceeds, according to the indorsement of the two bills of lading *first delivered* as above. At the trial, several points were made by the plaintiffs; but the principal one was, that the

the captain had no right to detain the goods in contravention of the bill of lading *first signed* by him. Willes, J. at the trial, considered the action as brought against France and Co., and that the defendant was merely a trustee, and in a similar situation to a sheriff when there are several claimants of property under an execution; and that as the plaintiffs and France and Co. were both *bonâ fide* holders of the bills, they who first got possession by a legal title ought to be preferred; and that for this purpose the possession of Coppell and Co. was to be considered as that of France and Co. The jury found a verdict for the defendant[1]. When the case came before the court on a motion for a new trial, Willes, J. gave no further opinion, but declared himself satisfied with the verdict. Ashhurst, J. was of opinion, that in point of law the plaintiffs were not entitled to recover, as no fraud could be presumed. There did not (he said) appear to be any reason for making the bills of lading in a different form, but the captain might suppose them to be the same in effect; and they were all of them in substance to the order of the shipper. Whoever then was first in possession of either of them had the legal title. The indorsement therefore of the two bills of lading to the agents of France and Co., was an immediate transfer of the legal interest in the cargo to them, of which Fairbrother had notice by Thompson's letter; the time of their arrival was not material, for the legal title vested on the indorsement. Buller, J. said, it was very material to consider that Fairbrother had no interest in the goods, and was known to all parties

[1] Caldwell v. Ball, 1 T. R. 210.

parties as the agent of Thompson; it was therefore (he thought) the same as if all the bills of lading had been to Thompson's order alone; and it was only by Thompson's misconduct, in indorsing one of the bills of lading to the plaintiffs, after he had delivered the two others to Coppell and Godwin, that any difficulty arose. Buller, J. also agreed in opinion with Ashhurst, J. upon two other points which were disputed at the trial, viz. first, that France and Co. might be considered as the creditors of Thompson, although the bills of exchange they held were not due, inasmuch as they had advanced the consideration for such bills; and secondly, that the mortgage did not bind the consignment, or affect the transaction, it being only a personal obligation on the covenantor, and also subsequent in point of time to the consignment in question[m].

Effect of indorsement to factor; and by factor to a third person; with and without notice.

It is clear that if there be an authority the most general, by indorsement of a bill of lading, without disclosing that the indorsee is factor, the owner as between him and the factor retains a lien till delivery of the goods, and 'till they are actually sold and turned into money. If the factor indorses the bill with notice to a third person, then it may be followed into the hands of such third person; for in such case it remains in his hands just as it did in the hands of the factor himself. But if the goods are *bonâ fide* sold by the factor at sea, where no other delivery can be given than by the indorsement of the bill of lading, it will be good notwithstanding the stat. 21 *Jac.* 1. c. 19. and the

[m] Caldwell *v.* Ball, 1 T. R. 216.

the vendee shall hold the goods by virtue of the bill of lading, though no actual possession is delivered; and the owner can never dispute with the vendee, because the goods were sold *bonâ fide* and by the owner's authority[n]. Mr. Justice Buller, speaking of the opinion of Lord Mansfield in the case just quoted, says, it was a very solemn opinion, and in his judgment one of the best cases that we have in the law on mercantile subjects. There are (he said) four points in that case, which Lord Mansfield has stated so extremely clear that they cannot be mistaken. The first is, what is the case as between the owner of the goods and the factor; the second, as between the consignor and consignee of the factor with notice; thirdly, as between the parties without notice; and fourthly, as to the nature of a sale of the goods at sea in general. It is to be recollected that the case of Wright and Campbell was decided by the judge at *nisi prius*, upon the ground that the bill of lading transferred the whole property at law; when it came before this court on a motion for a new trial, Lord Mansfield confirmed that opinion; but a new trial was granted on the suspicion of fraud: therefore it is fair to infer that if there had been no fraud, the delivery of the bill of lading would have been final. If there be fraud, it is the same as if the question were tried between the consignor and the original consignee. According to a note of Wright and Campbell which Mr. Justice Buller took in court, Lord Mansfield said that since the case in Lord Raymond[o], it had always been held that the delivery of a bill of lading transferred the property at

[n] *Per* Lord Mansfield, Wright *v.* Campbell, 4 Burr. 2050, 1. And see Dick *v.* Lumsden, Peake's Rep. 189. [o] 1 Lord Raym. 271.

at law; if so, every exception to that rule arises from equitable considerations which have been adopted in courts of law [p].

Lord Mansfield's opinion, in Wright and Campbell, questioned.

However, Lord Loughborough appears to have considered the opinion delivered by Lord Mansfield as only correctly applied to the case then in question before the court, of the consignment of goods to a factor to sell for the owner; and that it could not be extended to the case of a third person, claiming under an indorsement for value and without notice. His lordship, speaking of the case of Wright and Campbell, says, the first observation that occurs upon that case is, that nothing was determined by it. A case was reserved by the judge at *nisi prius*, on the argument of which the court thought the facts imperfectly stated, and directed a new trial. The case cannot therefore be urged as a decision upon the point. As an opinion of Lord Mansfield, that the right of the consignor to stop the goods cannot be set up against a third person, claiming under an indorsement for value and without notice, the authority of it, though no decision had followed, would deservedly be very great, from the high respect due to the experience and wisdom of so great and learned a judge. But (said Lord Loughborough) I am not able to discover that his opinion was delivered to that extent, and I assent to the opinion as it was delivered, and very correctly applied to the case then in question. Lord Mansfield is there speaking of the consignment of goods to a factor to sell for the owner; if the owner of the goods entrust another to sell them for him, and to

[p] 2 T. R. 74.

to receive the price, there is no doubt but that he has bound himself to deliver the goods to the purchaser; and that would hold equally if the goods had never been removed from his warehouse. The question on the right of the consignor to stop and retain the goods can never occur where the factor has acted strictly according to the orders of his principal, and where, consequently, he has bound him by his contract[q].

Indorsement by factor, as a pledge of the goods.

A factor cannot *pledge* the goods of his principal by indorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves; though the indorsee do not know that he was factor[r]. In trover for a quantity of beef, it appeared that the plaintiffs, who were Irish merchants, in December 1802 shipped the beef in question on their own account, consigned to Church as their factor, for sale; and the bill of lading, which was to deliver to order or assigns, being indorsed by one of the plaintiffs, was transmitted to Church. Soon after the arrival of the bill of lading it was indorsed by Church, and deposited by him with the defendants as a security for £200 advanced by them to him, it not appearing that they knew the beef had been consigned to him as factor. He stopped payment in June, and was afterwards declared bankrupt, not having paid for the beef, which the defendants got possession of, and refused to return, though the freight and other charges were offered. The usual credit was three months; therefore the bill of lading (which was within that date) conveyed to persons conversant in the trade, as the defendants were, an intimation

[q] 1 H. B. 366, 7. [r] Newsom v. Thornton, 6 East 17.

intimation that the goods were probably not paid for; though that circumstance does not appear to have had much weight in the decision, which proceeded on the general ground, that a factor cannot pledge the goods or effects of his principal. Lord Ellenborough in his direction to the jury stated, that the beef having been consigned to Church as a factor, gave him no authority to pledge the goods, but only to sell them for his principal, and therefore he had no authority to pledge the bill of lading, which was the mere emblem of the goods[s].

Distinction between a factor's selling and pledging the goods.

Afterwards, when the case came before the court, on a motion to set aside the verdict which had been obtained for the plaintiffs, his lordship said that it was a direct *pledge* of the bill of lading, and not intended by the parties as a *sale*. A bill of lading indeed shall pass the property upon a *boná fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended; but it cannot operate further. Now if the factor had been in possession of the goods themselves, and had proposed to *sell* them to the defendants *boná fide*, the property would have passed by the delivery; but not if he had only meant to *pledge* them, because it is beyond the scope of a factor's authority to *pledge* the goods of his principal. The *symbol* then shall not have a greater operation, to enable him to defraud his principal, than the actual possession of that which it represents. The principal who trusts his factor with the power to *sell* absolutely shall so far be bound by his act; but the defendants shall not extend the factor's act beyond what was intended

[s] Newsom v. Thornton, 6 East 19.

tended at the time; and here only a pledge was intended, which he had no authority to make. I consider (said his lordship) the indorsement of a bill of lading, apart from all fraud, as giving the indorsee an irrevocable, uncountermandable right to receive the goods, that is, where it is meant to be dealt with as an assignment of the property in the goods: but not where it is only meant as a deposit, by one who has no authority to pledge them; and having been dealt with in this case only as a deposit, it could not be made into a sale in order to give it effect[t]. Grose, J. agreed entirely with the lord chief-justice. Lawrence, J. observed, that there was no ground to complain of the defendants having been deceived by means of the bill of lading; for it would have been very easy for them to have inquired for the letter of advice which brought it, and which would have shewn that Church held it as a factor, and not as vendee of the goods. If persons will neglect all precaution, and advance money on goods, without inquiring whether the party have any right to dispose of them or not, they must bear the loss, if it turn out that he had no authority so to do[u]. Le Blanc, J. remarked, that some of the cases state the opinion of the judges generally, that an indorsement of a bill of lading will pass the property, but that must (he said) be taken with reference to the circumstances of the case, and is not to be applied to the case of a factor *pledging* the goods of his principal, but to that of a vendor *selling* goods in which he has a property[v]. The above distinction was fully recognized, and confirmed

[t] Newsom v. Thornton, 6 East 41, 2. [u] *Id.* 43. [v] *Id.* 44.

firmed by the court of king's bench, in a very late case of Martin against Cole and others, not yet reported[w].

Quære, if payment of freight be a condition precedent to transfer of property by bill of lading?

If the bill of lading be in the usual form, for delivery to the shipper or his order or assigns, he or they paying freight for the goods according to charter-party, it seems that these latter words make the bill of lading conditional, so as to prevent the property of the goods vesting under it until the freight has actually been paid or tendered; and that the acceptance, or tender of the acceptance, of bills drawn by the shipper on the consignee for the value of the goods, will not be sufficient; for in Walley and Montgomery, Lord Ellenborough declared that laying the invoice out of the question, he should have continued of opinion upon the letter of advice and bill of lading, that they were conditional, and required two things to be done by the plaintiff, first, the acceptance of the bills drawn on him at three months, as mentioned in the letter of advice, (which having been tendered on his part, must be taken as done); and secondly, the payment of the freight, which was neither paid nor tendered[x]. And if the plaintiff had neglected to perform the necessary conditions of the consignment, the defendant, whether he was the agent of the shipper or not, could not be considered as a wrong-doer, having obtained possession of the cargo under a competent bill of lading, and upon a performance of the conditions of the consignment. And if, having no notice of a better title, he were not a wrong-doer by receiving the goods, they could not be

[w] Martin *v.* Cole, H. 53 *G.* 3. [x] Walley *v.* Montgomery, 3 East 590, 1.

be taken out of his hands without paying those charges which he had been put to in obtaining them[y].

Invoice vests property, independent of bill of lading, subject only to be divested by stoppage *in transitu*.

But where goods are shipped for account and at the risk of the plaintiffs, that is a material piece of evidence, on a question in whom the property of the goods was at the time of their arrival, and whether it then vested in the plaintiff subject to defeazance, in case of the non-performance by him of the conditions on which the consignment was made, or whether it is to vest in him at a subsequent time on performance of those conditions. In Walley and Montgomery, it was decided, that the invoice vested the property in the plaintiff, subject only to defeazance if he did not perform the conditions of the consignment, by accepting the bills and paying the freight; for if there had been a loss at sea, that loss must have been borne by him. It was therefore held, that the defendant having, by virtue of another bill of lading sent him by the shippers, obtained the delivery of the timber, and refused to give it up without immediate payment, was liable to an action for so doing[z]. In the case alluded to Mr. Justice Grose observed, that by the bill of lading and invoice sent to the plaintiff, and the delivery to the captain, the property passed from the shippers to the plaintiff, for every purpose except as to the right of stopping the goods *in transitu* to the vendee; and as to the payment of the freight, that was a question between the captain and the plaintiff, the consignee of the goods, with which the defendant had no right to concern himself. The defendant must either have been a purchaser for a valuable consideration, or the agent of

[y] Walley v. Montgomery, 3 East 590, 1. [z] *Id.* 585.

of the shippers. As a purchaser for a valuable consideration, he could not be considered as agent of the captain under the bill of lading, so as to entitle him to claim the freight; but in truth there was no pretence for saying that he was a purchaser. Considering him as the agent of the shippers, and standing in their place, he was claiming a property in the goods from the plaintiff, which they had parted with to the plaintiff; and he had still less right to claim the freight, as neither he nor the shippers were liable for it, but the plaintiff; and he had no right to pay it for the plaintiff, as no man can make another his debtor by his own voluntary act against the will of that other[a]. In the case of Walley and Montgomery the bill of lading sent to the consignees was indorsed in blank by the shippers, and it does not appear whether that transmitted to their agents was or was not indorsed, though it is most probable it was.

Indorsement of bill of lading to shippers' agents, &c. after delivery, is immaterial.

But in a subsequent case, the bill of lading sent with the invoice, to the persons on whose account the goods were shipped, appears not to have been indorsed; but another bill of lading, which was transmitted to the plaintiffs, who were the agents of the shippers, is expressly stated to have been indorsed, for the purpose of securing the amount of the bill of exchange drawn for the value of the goods upon the consignees; and yet the goods having been originally purchased by their orders, for their use and at their risk, they were on that account held entitled to the possession of them as soon as they arrived, the shippers not having stopped them *in transitu*[b]. The shipment of the goods indeed, without

[a] Walley *v.* Montgomery, 3 East 591, 2. And see 2 T. R. 486. 490. 4 T. R. 512, &c. [b] Coxe *v.* Harden, 4 East 211.

without any bill of lading, was held to vest the property in the persons for whom they were destined, subject only to divestment by the shippers stopping the goods *in transitu;* for after such shipment, the former might have insured the goods as their property, and would have been entitled to recover the value if lost; and without insurance, the loss, if any in the course of the voyage, must have been borne by them[c]. But the right of stoppage *in transitu* was not attempted to be exercised till after the goods had arrived, and were delivered to the persons for whom they were destined, when it was held too late to stop them; though the shippers had transmitted the indorsed bill of lading to the plaintiffs, to authorize them to receive the goods from the captain. When that indorsement was made does not appear; perhaps it was not until after the goods got to the defendant's hands. At any rate, it came too late after actual delivery to the vendees. Nothing therefore was shewn to divest the property which originally vested in them upon the shipment of the goods; and when once they had got the possession of the goods, they had a right to transfer them to the defendants[d]. In such case, it is not material if the brokers of the consignees or vendees, in the account of sales rendered by them to their principals, state the net proceeds to be carried, *for the present*, to their credit, "*though now under litigation*," which sufficiently explains the reason for so doing, viz. because the property was then under litigation. But the form of rendering such account cannot affect the question of right as between the shippers and their consignees[e]. A consignment, once made, cannot be effectually

[c] Coxe *v.* Harden, 4 East 211. [d] *Id.* [e] *Id.*

tually countermanded, or varied, *except in the sole case of insolvency*[f].

Where a letter of advice is necessary.

In general cases, it is the duty of the shipper of goods to give notice of the shipping of them by a letter of advice; for otherwise the consignee of the goods may lose the opportunity of insuring them. But that is capable of being controuled by the course of dealing between the parties, by which such letter of advice may be dispensed with. If no letter of advice be sent where one is necessary, it may, in case of loss or accident, prevent the shipper from recovering the price of the goods from the consignee, if he has thereby been prevented from insuring them; though that seems rather the subject of a special action on the case, for the breach of duty. However, where it was in evidence that a parcel of goods sent by the consignor to the consignee had been paid for, though no letter of advice was produced, it was held evidence from whence the jury might infer that to be the course of dealing between the parties. The defendant, who resided at Stockport, had ordered a quantity of glue of the plaintiff in London; part of which was to be sent immediately, and the rest in two months. The glue was sent by sea to Liverpool, to be thence forwarded to the defendant at Stockport. The first parcel was received and paid for. The ship in which the second parcel was sent was burnt, with its cargo. The action was for the price of this second parcel; and the defence, that there was no letter of advice sent of it, so that the defendant could not insure. But none having been sent with the first parcel, the plaintiff, under

[f] Haille v. Smith, 1 B. & P. 563. The Constantia, 6 Rob. 321.

under the judge's direction, had a verdict[g]. In modern times, the courts lean much against the necessity of bringing cross actions[h], and would therefore be inclined to give the vendee any advantage to be derived from the neglect to send an invoice, by way of defence to an action for the price of the goods; and might even perhaps be disposed to preclude him from bringing any cross action for such neglect, if he omitted to take advantage of it in a previous action for goods sold and delivered, to recover the price[i].

Effect of agreement to assign goods at sea, and deposit of the policy, &c. as a security for a debt.

A person, who afterwards became bankrupt, having received advice from his correspondent abroad of his intention to ship goods on his, the bankrupt's, account, procured insurance to be made, and prevailed on a third person, his creditor, to advance more money on his promissory note; and an agreement was made for the assignment of the goods, delivery of the policy, and the indorsement of the bill of lading on its arrival. The policy and letters of advice were accordingly deposited with him; but the bill of lading was not indorsed till after the act of bankruptcy, when the goods were delivered by the captain to the defendant, who paid the freight and charges. The principal question was, whether the defendant, by virtue of the agreement, had a right to retain possession as against the assignees. At the trial Grose, J. was of opinion that the legal property in the goods remained in the bankrupt till the indorsement, and he could not dispose of it after his bankruptcy, in prejudice of the rest of the creditors; the plaintiff accordingly obtained a verdict.

[g] Goom v. Jackson, 5 Esp. 112. [h] 7 East 479. But see 2 N. R. 136.
[i] 1 Camp. 38. 2 Camp. 63.

verdict. But this was afterwards on motion set aside, and a new trial granted; on the ground, that the agreement and deposit of the policy, &c. gave the defendant an equitable lien upon the property, and the assignees could only claim subject to such lien[j]. As between a person who has an equitable lien and a third person, who purchases the goods for a valuable consideration and without notice, the prior equitable lien shall not over-reach the title of the vendee: for the title of him who has both a fair possession and an equitable title shall be preferred to that of a mere equitable interest. But as between the person who has the equitable lien and the assignees, if the lien subsisted before the bankruptcy, they shall never recover or retain the property without discharging the money due. The party who has the equitable lien ought not to be on a footing with the rest of the creditors, for whom the assignees are trustees; for the creditors at large trusted to a personal credit, but he trusted to a pledge. The money lent to the bankrupt would never have become a part of the assets of his estate, had it not been lent upon the credit of the goods pledged; and when the money was taken out of the bankrupt's effects and repaid, they were only just where they would have been, if the money had never been advanced. As between the person having the lien and the assignees, they must stand in the place of the bankrupt, and take his property subject to all the equitable liens to which it would have been subject in the hands of the bankrupt himself. By the act of bankruptcy, they only get the legal right. The bankrupt himself had the legal right before

[j] Lempriere v. Pasley, 2 T. R. 485.

before the bankruptcy, but he could never have retained the goods against the lien, without paying the money borrowed. So neither could the assignees. Nor if the party obtained the possession, could they get it from him without paying the money advanced; for retaining the property, agreeable to a lawful stipulation between him and the bankrupt previous to the bankruptcy, could never, even in a court of law, be said to be a wrongful conversion. If the case had rested on these principles of reasoning only, Mr. J. Ashhurst said, he should have had very little doubt upon it; but (as he observed) this reasoning was supported by cases in equity[k], and whatever may be set off in a court of equity, on the ground of lien, may likewise be set off in an action of trover. It makes no difference whether there be an actual assignment of the bill of lading, or only an agreement to assign; as neither conveys more than an equitable title. It might be a great inconvenience to commerce, if it were laid down as law, that a man could never take up money upon the credit of goods consigned, till they actually arrived in port. There seems to be no inconvenience on the other side; nor can it be any inlet to fraud, for no other person can be induced to lend money on the credit of the cargo, after the party has delivered over all the documents to him who has the first lien[l].

[k] *Per* Ashhurst, J. 2 T. R. 485. And see Green *v.* Farmer, 4 Burr. 2218. Brown *v.* Heathcote, 1 Atk. 160. Falkner *v.* Case, Bro. Chan. Rep. 125. 2 T. R. 493. S. C. [l] *Per* Ashhurst, J. 2 T. R. 491. 496.

CHAPTER II.

OF THE DUTIES AND RESPONSIBILITIES RESULTING FROM A BILL OF LADING: AND HEREIN, OF THE DUTIES, &c. OF COMMON CARRIERS BY WATER.

Contents of chapter.

IN this chapter, it is intended to consider, first, the duties of the captain and owners of a general ship, as common carriers, to carry the goods at a reasonable price, to sail in proper time, and to take care of and deliver the goods; how far the owners are liable for the master's non-delivery by the common law, and the limitations of their liability by statute; 2dly, for what losses the master or owners are liable; under which head may be comprized, their liability for loss or damage, by leakage, occasioned by the insufficiency of the vessel or other cause, and by robbery, fire, or the like; what proofs are in general necessary to charge them, and the distinction between the cases of losses happening by non-feazance and misfeazance; and 3dly, what will or will not prevent or discharge their liability, as, the owners of the goods, by themselves or their servants, watching them on board the vessel, or not entrusting the

the keeping of them to the master, &c. or their not being delivered in the usual course of dealing. Under this last head, it is also proposed to consider the notices given by carriers, and the late cases in which the legality of such notices has been questioned and sustained; what want of care in the master is within the exception sometimes contained in such notices, and where the owner will not be protected by them, if the ship be not sea-worthy, or the loss be occasioned by a tortious act of conversion.

Duties of captains, &c. by virtue of a bill of lading.

Having already considered the nature of the contract evidenced by a bill of lading, and pointed out the differences between that instrument and a charter-party, little more is necessary to shew the duties resulting from the former of these contracts. The captain or master of the ship thereby binds himself to take care of, and safely carry the goods to their port or place of destination, and there deliver them to the persons appointed to receive them. Every thing necessary to these ends therefore, and in his power, he is bound to perform. Nor is he exempt from responsibility for not accomplishing these objects, except in the excepted cases enumerated in his bill of lading. It therefore behoves him to see that he has protected himself from liability, in all cases not within his power to guard against otherwise than by such exceptions. He ought well to understand and consider the meaning and effect of his bill of lading before he signs it, and particularly any written words which may be introduced by the merchant, as an addition to or alteration from the printed form; for although the printed as well as the written stipulations all equally form part of the contract, yet the latter being specially introduced, and in general

general expressing the particular object of the contracting parties, courts are always disposed to give them their fullest effect[a]. Besides, it is to be expected that the merchant will not require any such alteration from or addition to the printed form, without good reason. The charter-party and bills of lading, which frequently refer to each other, and together constitute the captain or master's obligation, as well as that of his owners, should be his constant guide, from which nothing should induce him to deviate, unless plain reason or strict necessity.

As common carriers.

It has been held that an action lies against a common bargeman, upon the custom of the realm, without a special promise, as much as against a common carrier by land[b]. By one of the reports of the case cited, it appears that the plaintiff declared upon the custom of the realm, that such carriers ought to keep the goods delivered to them to be carried, safely, so as to prevent loss by the default of themselves or their servants; and that the defendant suffered the goods to be lost by such default[c]. But by the other report, it appears to have been charged in the declaration, that the defendant so negligently kept the goods, that they were taken from him by persons unknown, and lost. However, the particular form of the declaration in this case is not material, as the general question of the liability of a common carrier by water, such as the defendant was[d], appears clearly to have been discussed, and solemnly decided upon a writ of error, in favour of such liability. It was truly observed that although the duty was

[a] *Ante*, 185, 6. [b] Rich *v.* Kneeland, Cro. Jac. 330. Hob. 17, 18. S. C. [c] Hob. 18. [d] Cro. Jac. 331.

was laid as arising from the custom of the realm, yet it was the common law which created the duty[e]. In Hobart's reports of the case, the defendant appears to have been charged as a common hoyman, and he seems to have been so considered in subsequent cases[f]. But the distinction between a bargeman and a hoyman is not material. And a ship-master, or keelman, and hoyman, are the same thing[g]. Where the defendant was declared against as the master of a ship, and that fact was found by special verdict, it was held upon argument, that the case did not differ from that of the hoyman, before cited[h]. It was admitted and urged in the argument for the defendant, that if any action could be maintained it would lie against the owner of the ship, to whom the plaintiff paid freight[i]. A lighterman is also a common carrier[j]. Watermen, or Gravesend boatman, who carry both passengers and goods, are also to all intents and purposes common carriers, as much as stage-coachmen[k]. But yet it seems that a carrier is not liable for the loss of a passenger's goods, unless the reward be paid for the carriage of the goods as well as the conveyance of the passenger[l]; though it is not necessary there should be a separate reward for each. It seems that the owners of the Dublin packet-boats, which carry the mail from Dublin to Holyhead, and the like, are common carriers, and as such liable for the loss of the luggage of the passengers, or any damage it may sustain whilst in their custody, the same as other common carriers. This point does not appear to

[e] Hob. 18. [f] Morse *v.* Slue, 2 Lev. 69. [g] Dale *v.* Hall, 1 Wils. 281. [h] 2 Lev. 69. [i] *Id.* [j] E. I. C. *v.* Pullen, 1 Str. 690. [k] *Per* Jones J. Lovett *v.* Hobbs, 2 Sho. 128. [l] *Id.* note b. *Id.* 82, b.

to have received any judicial determination[m]; though it is one about which no great doubt can it seems, at this day, be entertained. But although the captains of ships or barges, &c. are liable as common carriers, where they are in the habit of carrying all goods which are offered to them for hire by any of his majesty's subjects, (and it does not seem to make any difference, in such case, whether one person takes the whole of the ship to himself for the voyage or not, any more than if the whole of a stage-coach be taken for the journey; unless there be a particular contract, or special acceptance) yet it cannot be supposed that the master of a merchant ship, by taking more than one person's goods, on any particular voyage, thereby always afterwards makes himself a common carrier by that vessel, and liable as such on all future occasions.

To carry the goods, at a reasonable price.

Several important consequences result from the foregoing observations. The first is, that the captain of a ship, or other common carrier by water, is liable to an action on the case for refusing to carry goods, if he have convenience for them in his vessel, and the price of the carriage be offered[n]. But if there be not sufficient room in the vessel, he may refuse to take charge of the goods; and then, if the owner will notwithstanding put them on board, the carrier is not answerable for them, in case they are lost. There needs no particular agreement for hire to render a common carrier liable; because if there be none, he may sue upon a *quantum meruit*[o]. Another important consequence from the above-mentioned determinations is, that

[m] See Nicholson *v.* Willan, 5 East 507. [n] Jackson *v.* Rogers, 2 Sho. 327, 8. [o] Lovett *v.* Hobbs, *coram* Jones, J. *Id.* 128.

that the captain of a ship is bound to take a reasonable price for the carriage of goods[p]; and if more be demanded it may be refused, unless a particular sum has been agreed for between the parties.

To sail in proper time.

And it seems that he must sail at or about the appointed time if any, or the usual time, or in a reasonable time after the goods are shipped. Again, the captain of a ship, as a common carrier, is under the same obligation, and answerable for the same losses and damages, as other common carriers. A particular inquiry into their obligation and liability is unnecessary, and would be foreign to the subject of the present book; which was originally intended to be confined to the duties, &c. resulting from the contract evidenced by a bill of lading. But that species of instrument, unless for the new exceptions introduced into it, so very nearly evidences the same contract as that implied by law in the case of all common carriers by water, that a general consideration of the duties and responsibilities of such carriers, will, in a great measure, assist in the construction to be put upon a bill of lading; and they will therefore be made the subject of the remaining part of this chapter.

To take care of and deliver the goods.

By the custom of the realm, the duty of the carrier is not only to take care of the goods, and keep them in security[q], but safely to carry[r] and deliver[s] them. A promise to deliver safely, includes a promise to keep safely[t]. However, there is no solemn adjudication upon the general question, as to what shall be a sufficient delivery;

[p] See Harris *v.* Packwood, 3 Taun. 264. [q] Hob. 18. [r] 1 Rol. Abr. 2. C. pl. 1. [s] Ow. 57. [t] 1 Wils. 282.

delivery; though that question has been raised in several cases, which have ultimately gone off on their own particular circumstances. Whether a delivery be necessary, or not, may depend on the general custom of trade, or the particular usage which has prevailed between the parties[u]. It has been decided that a common carrier must be understood to have contracted to carry the goods of any particular person, on the same terms and in the same manner that he has carried other people's; and that independently of the general duty of carriers, they are bound to do so by the common course of trade[v]. An opinion was intimated by Gould, J. in the case cited, that all carriers are bound to give notice of the arrival of goods to the persons to whom they are consigned, whether bound to deliver them or not[w]. Lord Kenyon, in a more modern case, appears to have been of opinion that the owners or masters of ships, bringing goods from foreign countries, were not bound to deliver them into the merchants' warehouses; and that it was sufficient to make delivery at the wharf to which they generally come[x]. Ashhurst, J. seems to have been of the same opinion in the case of goods brought by sea from one country to another, and properly landed and warehoused; but in all other cases, he inclined to think a delivery to the consignee necessary, as otherwise the owner of the goods might only have the responsibility of a common porter for their safety[y]. Mr. J. Buller coincided with him in this part of his opinion, on the ground of the variety

[u] *Per* Grose, J. 5 T. R. 399. [v] G lden *v.* Manning, 2 Blac. Rep. 916. [w] *Id.* [x] Hyde *v.* Trent and Mersey Navigation, 5 T. R. 394, &c. [y] *Id.* 396.

variety of contracts a contrary doctrine would suggest. But he observed, that when goods are brought from foreign countries under a bill of lading, that is merely an undertaking to carry from port to port[z], and a delivery at the usual wharf will discharge the carrier, who perhaps has no means of land carriage[a]. Mr. J. Grose also agreed in this opinion, saying, that by the general custom, the liability of ship-carriers is at an end when the goods are delivered at the usual wharf; but that such liability depended on the custom of the trade in which the ship is engaged. On the general question, he concurred in opinion with the rest of the judges, on the ground suggested by Mr. J. Ashhurst[b].

Owners liable for master's non-delivery.

The owners of a ship are responsible for the acts of their servant, the master, in all things which respect his duty under them; they are answerable for his misconduct to third persons, and must seek their remedy over against the master. In these cases, the maxim applies, "*respondeat superior.*" A vessel belonging to the defendants, trading from Hull to Gainsborough, took on board some goods belonging to the plaintiff, which were to be delivered at Stockwith; the vessel went as far as Stockwith, and delivered part of the cargo; but the master, finding it inconvenient to deliver the rest there, proceeded on the voyage, and the vessel sunk before her arrival at Gainsborough; but as she had reached Stockwith in safety, and might have delivered the goods there, it was held that an action was maintainable against the owners, for the loss which so happened in consequence of the misconduct

[z] See 1 Wils. 281. [a] *Id.* 396, &c. [b] *Id.* 398, &c. *ante*, 80, &c.

conduct of the master[c]. On the other hand, they are not answerable for his misconduct, in those things which do not respect his duty towards them; as, if he were to commit an assault upon a third person, in the course of the voyage[d].

Statutable limitations of owner's responsibility.

Before this chapter is closed it will be proper to remark, that although as is observed in a subsequent page, the legislature rejected a bill brought in for the purpose of narrowing the responsibility of carriers, on the ground of their competency to limit their own responsibility by notice[e], yet in order to protect ship-owners from the treachery of the master and mariners, it was enacted by the statute 7 *Geo.* 2, c. 15, s. 1, that "the owners of vessels shall not be liable for any loss or damage, by reason of any embezzlement, secreting or making away with (by the master or mariners, or any of them) of any goods shipped on board any vessel, or for any act, matter or thing, damage or forfeiture, done, occasioned or incurred, by the master or mariners, or any of them, without the privity and knowledge of the owners, further than the value of the vessel with her appurtenances, and freight for the voyage wherein the embezzlement, &c. shall be made." This statute was held to extend to the case of a robbery, in which one of the mariners was concerned by giving intelligence, and afterwards sharing in the spoil[f]. In the case cited, Buller, J. said, that the statute was meant to protect the owner against all treachery of the master and mariners, as appears from

[c] Ellis *v.* Turner, 8 T. R. 531. [d] *Id.* 533, *per* Lord Kenyon, C. J. [e] *Post*, 363, 4. [f] Sutton *v.* Mitchell, 1 T. R. 18.

from the enacting clause, as well as the preamble of the act. It meant to relieve owners from the hardship imposed upon them by the common law, and at the same time to encourage trade and navigation, by providing that they should be answerable no farther than they had trusted the master and mariners themselves, that is, to the value of the ship and freight[g]. A subsequent statute, 26 *Geo.* 3, c. 86, has confined the liability of owners of vessels in a similar manner, in the case of any loss or damage, by reason of any robbery or embezzlement, &c. if without their privity, although the master or mariners be not concerned in or privy to it[h], and at the same time exempts the owners from any loss or damage by fire[i]. There is also a provision in this statute, that they shall not be answerable for any loss or damage, which may happen to any gold, silver, diamonds, watches, jewels or precious stones, which shall be shipped on board the vessel, by means of any robbery, &c. unless the proprietor or shipper shall, at the time of the shipment, insert in his bill of lading, or otherwise declare in writing to the master or owners, the true nature, quality and value of such gold, &c.[j] Another clause in the statute directs, that the freighters or proprietors of the goods shall receive satisfaction in proportion to their losses, if the value of the vessel and freight is not sufficient to afford them full compensation; and empowers them to exhibit a bill in equity for a discovery of such value and the amount of such losses, and to obtain an equal distribution. It also enables the owners of the vessel to exhibit a similar bill under certain regulations[k]. Each of the above statutes

[g] *Per* Buller, J. 1 T. R. 20. [h] § 1. [i] § 2. [j] § 3. [k] § 4.

tutes has an express proviso to prevent its being construed to impeach, lessen or discharge, the remedy against the master and mariners, in respect of any embezzlement, secreting or making away with, any gold, silver, &c. or merchandize, shipped on board the vessel, or on account of any fraud, abuse or malversation, on their part[l]. The statutes 3 and 4 *W.* and *M.* c. 12, s. 24, and 21 *Geo.* 2, c. 28, s. 3, seem peculiarly applicable to carriers by land.

For what losses, &c. masters are answerable. For damage by leakage, caused by rats.

Masters of ships, &c. as common carriers, are in general liable for all losses and damages, except those happening from the acts of God, or the king's enemies[m]; whether they be in fault or not, and though the damage, &c. be wholly unavoidable. In an action against a carrier, in case upon the custom of the realm for breach of his general duty, or in *assumpsit* for the breach of his implied contract, though it be alleged in the declaration that the loss was by negligence, evidence is not admissible on the part of the defendant, to shew that he had taken all possible care of the goods, but that rats made a leak in the keel of the vessel, whereby the goods were spoiled by the water coming in, although the defendant and his servants pumped and did all they could to prevent it. If such evidence be received by the judge, the court will grant a new trial[n]. Every thing is negligence in a carrier which the law does not excuse; and he is answerable for goods the instant he receives them into his custody; so that if they are lost or damaged in port before the ship sets sail, he is liable[o]. In an action against the master of a ship,

[l] See 7 *Geo.* 2, c. 15, s. 4. 26 *Geo.* 3, c. 86, s. 5. [m] 1 Wils. 281.
[n] Dale *v.* Hall, 1 Wils. 281. But see 3 Taun. 264. [o] 2 Lev. 69.

ship, for the loss of a puncheon of rum, although it was proved to have been staved by the defendants' servants in letting it down into the ship, by accident, all possible care having been used in letting it down; yet the chief justice directed the jury to find for the plaintiff, which they did[p]. Hence it is clear, that carriers are liable for damage, as well as loss, except it happen by the act of God, &c.

For such damage caused by the insufficiency of the vessel.

A fortiori the master or owners are answerable, if the goods become spoiled or damaged in consequence of their not having provided a sufficient vessel, for the performance of the voyage contracted for. In every contract for the carriage of goods, between a person holding himself forth as the owner of a vessel ready to carry them for hire, and the person putting the goods on board or employing the vessel for that purpose, it is a term in the contract implied by law, on the part of the carrier or lighterman, that his vessel is tight, and fit for the purpose or employment for which he offers it to the public: it is the very foundation and immediate substratum of the contract. The law presumes a promise to that effect on the part of the carrier, without any actual proof; and every reason of sound policy and public convenience requires it should be so. The declaration states such promise to have been made by the defendant, and it is proved by shewing the nature of his employment; or, in other words, the law in such case, without proof, implies it. Where the declaration averred that the ship was not tight and capable of carrying the goods safely, that allegation was held

[p] Goff v. Clinkard, cited 1 Wils. 282.

held to be made out in evidence, by shewing that the vessel was leaky, and had nearly sunk in the dock before the goods could be unloaded from on board. The court considered this a personal neglect of the owner, or more properly a non-performance of his implied undertaking to provide a fit vessel for the purpose[q].

But it is enough if it be *probably* sufficient for the voyage.

But carriers as such, independently of any special contract or exception, are not answerable for damage occasioned by the act of God, or the king's enemies; although it is incumbent upon them to use ordinary prudence. If they fail to do that, by whatever peril the accident finally happen, they are liable; for it is their imprudence, and not that peril which they might have avoided, which occasioned the accident. As, if they go to sea with a vessel obviously insufficient to perform the voyage, or unnecessarily run in the way of enemies' privateers. But it is enough if the vessel, without any extraordinary accident, be probably sufficient to perform the voyage. It is not required of carriers, that they should use extraordinary foresight to provide against the violence of the winds and waves, which no foresight or care can guard against. The case of the hoyman in Strange[r] well exemplifies these observations. Coming through a bridge, by a sudden gust of wind the hoy was sunk, and the goods were spoiled. The plaintiff offered evidence to shew, that if the hoy had been sufficient to sustain the stroke it received, the loss would not have happened. But the chief justice held the defendant not

[q] Lyon v. Mells, 5 East 437. [r] Amies v. Stevens, 1 Str. 128.

not answerable, the damage being occasioned by the act of God; and though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet that the accident having happened by a sudden gust of wind, it was quite a different case. No carrier, he said, was obliged to have a new carriage for every journey. It is sufficient if he provides one, which, without any extraordinary accident like this, will *probably* perform the journey[s].

It appears to have been held so long ago as the reign of Edward the fourth, that it is no excuse for a carrier to say he was robbed of the goods[t]. The reason given by some is, that he is paid for the safe carriage and delivery[u]; but others give another and better reason, viz. the public employment he exercises[v], and the policy of making him answerable for so important a trust, which is otherwise so much open to abuse. If he be robbed of the goods, he is answerable to the owner in the value of them[w]. There is therefore no inducement to him to connive with thieves, as he otherwise might do. However, for the owner to avail himself of this salutary regulation, it is necessary that he should be able to prove what the goods consisted of and their value; to enable him to do which in the event of a loss, it is advisable that he should not pack them himself, but leave that to a servant or agent, who can speak to these circumstances if called upon, as the owner cannot be a witness

For loss by robbery.

[s] Amies *v.* Stevens, 1 Str. 128. [t] Year Book, 9 E. 4. cited Ow. 57, by Gawdy, J. 1 Inst. 89, a. [u] *Id.* 2 Sho. 82, b. [v] 2 Sho. 128, b. Payley's Principal and Agent, 13, i. [w] Woodleife *v.* Curteis, 1 Rol. Abr. 2, C. pl. 4.

ness in his own cause. In nine cases out of ten it happens, that when property is lost or damaged in the hands of a carrier, the owner loses his remedy for want of the necessary evidence; which may always be obtained by observing this caution.

By fire, or the like.

A carrier being in the nature of an insurer, against all loss or damage except that by the act of God or the king's enemies, is liable in case of an accidental fire, though the jury expressly find that the loss or damage happened without any actual negligence in the defendant[x]. So in the case of a loss or damage, happening by any accidental cause whatever, however impossible it may be for human foresight to guard against it, the master or owners of a general ship will be liable to make good the loss or damage sustained, unless it happen by the act of God or the king's enemies, or other accident expressly excepted by the bill of lading, or by notice or advertisement, or there be some other evidence of an express and more limited contract. But according to the modern decisions, the operation of the general contract and duty raised by law, to be answerable for all perils except the act of God or the king's enemies, may, in all cases, be limited and restrained by either of the above modes, or, as it seems, any other which may indicate the intention of the party, not to risk the whole extent of the general common law obligation.

Not necessary to prove contract, or negligence.

A declaration in case, upon the custom of the realm, is the same in effect with a declaration in *assumpsit*, upon

[x] Forward *v.* Pittard, 1 T. R. 27. Hyde *v.* Trent and Mersey Navigation, 5 T. R. 389.

upon the implied promise. In the old forms, it is *quod suscepit*, &c. which shews that the action arises *ex contractu*; and where the plaintiff declares in *assumpsit*, the promise need not be proved, the law raises it. In either case, it is likewise laid that the defendant did not deliver the goods safely, but so negligently kept them that they were lost or spoiled, which also requires no proof; for the law implies negligence, unless the defendant can prove a delivery of the goods, or that it was prevented by the act of God, or the king's enemies [y]. These observations however are only applicable to the case of common carriers, who in the course of their ordinary duty have accepted the goods to be carried for reward.

Distinction, between nonfeazance and misfeazance.

For there is this distinction, that neither a common carrier, nor any private person, is liable for a loss or damage occasioned by a mere *nonfeazance*, in not performing his promise to take charge of goods, without reward; for that is a necessary consideration, to raise a duty in him to do any particular act. But either the one or the other is liable, whether he is to have reward or not, for any *misfeazance*, or improper conduct with respect to the goods, after he has taken charge of them; for though there be no obligation to take such charge, he cannot do the owner of the goods an injury with impunity. The only difference between the case of a carrier and any private person is, that the former is obliged to take charge of the goods for a reasonable reward, and the latter is not [z]; though neither

[y] Dale *v.* Hall, 1 Wils. 282. *Per* Lee, C. J. and Dennison, J. [z] Coggs *v.* Barnard, 1 Lord Raym. 909. Hutton *v.* Osborne, cited 1 Sel. N. P. 416. 2d ed. And see 3 Taun. 271, 2.

neither of them can be called upon to do so without such reward.

Carriers not discharged by owners watching the goods,

In either case, of a common carrier or private person, if he is to be rewarded for the safe custody of the goods, and expressly or impliedly warrants their security, his liability to answer for any loss or damage which may happen to them will not be affected, by the owner of the goods, for the sake of greater security, watching them himself, or sending his own servant with the goods, who pays for watching them, because he apprehends the danger of their being stolen[a]. It would indeed be very unreasonable if it were otherwise; as it is for the carrier's benefit, if he act honestly, that an additional guard should be afforded, so that it does not interfere with that provided by the carrier.

Aliter, if the keeping be not entrusted to the carrier.

But if the owner does interfere with the means used by the carrier to guard the goods, or takes them altogether into his own keeping, or that of his servant, though they remain on board the vessel, the carrier is thereby discharged, as the goods no longer continue in his custody; and if such conduct be pursued on his taking of the goods on board the vessel, he is never entrusted with them for the purpose of keeping, but only for carriage. In an action by the East India Company against a lighter-man, on his undertaking to carry goods for hire, from a ship in the river Thames to the company's warehouses, it appeared in evidence that it was the usage of the company, on the unshipping of their goods, to put an officer

[a] Robinson v. Dunmore, 2 B. & P. 416. 419, *per* Chambre, J.

cer (who is called a guardian) in the lighter, and who, as soon as the lading is taken in, puts the company's lock upon the hatches, and goes with the goods to see them safe delivered at the warehouse; which was done in this case; and part of the goods were lost. Upon this evidence, the chief justice was of opinion that it differed from the case of a common carrier, there not being any trust in the defendant, and the goods never having been in his possession or keeping; but in that of the company, who had hired the lighter, or their servant. He therefore thought the action was not maintainable; and the plaintiff was nonsuited[b]. In the case of Robinson and Dunmore, Mr. J. Chambre observed that the decision in the case in Strange proceeded on the usage of the East India Company, not to entrust the lighter-man with their goods, but to give the whole charge of the property to their own officer[c].

Or, they are not delivered in the usual course of dealing.

When there is any reason to suspect fraud in the delivery of the goods by the owner, or there is ground to negative a general acceptance of them by the carrier, as, in the case of extraordinary peril, and the jury find that they were not delivered to the carrier in the usual course of dealing, the court will not disturb such verdict. The case was this, the defendant, a common carrier from R. to B. through W. employed distinct boats to carry from R. to B. and from W. to B., which passed on different days; the plaintiff knowing this, and having corn at W., which was threatened to be seized by a mob, and fearing to wait till

[b] East India Company v. Pullen, 1 Str. 690. [c] 2 B. & P. 419.

till the defendant's boat would, in the usual course of employment, go from W. to B., stopped the boat passing from R. to B., and, without disclosing the circumstance to the boat-man, prevailed on him to take the corn on board, and then dispatched him forward in the night; the corn being seized by the mob, an action was brought for the loss; and after a verdict for the defendant, negativing that the corn was delivered in the usual course of dealing as to a common carrier, it was held that the verdict might be sustained, either on the ground of fraud in the plaintiff; or on that of a tacit stipulation on the part of the defendant, not to be answerable as a common carrier for the violence of the mob; or on the ground that the boat-man had not authority to accept the goods at W., much less to accept them generally[d]. There can be no doubt but that under circumstances of particular peril, like the above, if the carrier be apprized of them he may make a special acceptance, that is, only engage to be answerable for the goods as he may be reasonably required to do under such circumstances; and if the owner be not content with that engagement, the carrier may altogether refuse to take charge of them.

The legality of carriers' notices questioned.

Carriers by water, as well as by land, have lately got into the habit of publishing advertisements and hand-bills, in restriction of their common law liability, to such an extent as greatly to diminish the security which formerly existed in sending goods by them. In the absence of any tortious conversion of the

[d] Edwards v. Sherratt, 1 East 604.

the goods, the courts have given effect to these notices, even to the total exclusion of any responsibility, in all cases, where the terms of the notices have not been complied. For instance, where the advertisement was, that if goods above a certain amount were not insured and paid for at the time of delivery, the defendants would not be accountable for them, and this was omitted to be done, a verdict even for that amount was set aside, and a nonsuit entered[c]. The decisions upon this subject have invariably countenanced these innovations on the common law liability. The carriers even seem to have doubted the stability of the decisions, by applying to parliament for legislative sanction to narrow their responsibility; which has been refused, on the ground of their having so successfully exercised the power of limiting it themselves. But it is yet questionable whether parliament should not interfere, and prevent carriers from limiting or varying by their own act, as they have done, the responsibility so wisely cast upon them by the common law. The general question as to the validity of these notices has been more than once before the court. In one of the cases it was argued, that the notice given by the defendant was illegal, being calculated to exempt him from a responsibility cast on him by law as a carrier of goods by water; at the close of the argument the court intimated an opinion that in the determination of that case, it might perhaps not be necessary to enter into a consideration of the general question, as to the validity of these notices in point of law, and to what extent

[c] Nicholson v. Willan, 5 East 514. And see 3 Taun. 264.

tent and upon what principles they might be supportable. And they were ultimately of opinion, that admitting the notice given by the defendant to be valid, as an agreement between him and the shippers of goods, the circumstances stated did not bring the plaintiff's loss within such agreement [f].

Such notices sustained.

In a late case, it was contended on the part of the plaintiffs, that such a special acceptance of goods by a common carrier as was contained in the defendant's notice, was contrary to the policy of the common law, which had made common carriers responsible to an indefinite extent, except for losses occasioned by one of the two well known excepted perils, viz. "the act of God or the king's enemies." But considering the length of time during which, and the extent to which, the practice of making such special acceptances of goods for carriage, by land and water, had prevailed in this country, under the observation and with the allowance of courts of justice, and with the sanction and countenance also of the legislature itself, (which is known to have rejected a bill brought in for the purpose of narrowing the carriers responsibility in certain cases, on the ground of such a measure being unnecessary, inasmuch as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract) considering also that there was no case to be met with in the books in which the right of a carrier, thus to limit by special contract his own responsibility, had ever been by express decision denied: the court said they could not do

[f] Lyon v. Mells, 5 East 436, 7.

do otherwise than sustain such right in that instance, however liable to abuse and productive of inconvenience it might be; leaving it to the legislature, if it should think fit, to apply such remedy hereafter as the evil might require[g].

What want of care in the master is within the exception of notice.

In the case of Ellis and Turner, indeed, the defendant was held liable notwithstanding such notice. There the substance of the notice was, that in future the owners of vessels would not be answerable for any loss or damage that might happen to any cargo, unless it should be occasioned by the want of ordinary care and diligence in the master and crew, in which case they would pay £10 *per cent.* upon the loss or damage, provided such payment did not exceed the value of the vessel; but they were willing to insure against all accidents on receiving extra freight in proportion to the value, &c.[h] Printed hand-bills to this effect, with the names of the defendants and of several other owners, were left at the respective dwelling-houses of the merchants and wharfingers at Hull, and were also posted up at the Exchange and Custom-house, and at the wharfingers' staiths and warehouses, and in other public parts of that town; though they were not published in the Gazette, or in the London or provincial newspapers. Martin and Rooth, by whom the pliantiff's goods were shipped in the defendants' vessel, had such printed hand-bills left with them, and knew the contents thereof, previous to the time when they shipped the goods, but had not given any information thereof to the plaintiff, who was a grocer residing at Mansfield

[g] Nicholson v. Willan, 5 East 507. [h] Ellis v. Turner, 8 T. R. 532.

field in the county of Nottingham; nor did the plaintiff know of any such notice having been given by the defendants[i]. No agreement was entered into by the plaintiff for the payment of any extra freight by way of indemnity, or insurance against risk or loss[j]. In proceeding from Stockwith, where the goods were to be delivered, to Gainsborough, and before her arrival at the latter place, the defendant's vessel, without any want of ordinary care or attention of the master or crew, sunk in the river Trent, whereby the plaintiff's goods were damaged. The proceeds arising from the sale of the goods in their damaged state, amounting to £18. 10*s.* were received by the defendants, and having been paid into court, and being deducted from the sum of £106. 18*s.* 5*d.* (which was the value of the goods), the plaintiff's demand was reduced to £88. 8*s.* 5*d.* upon which last-mentioned sum the defendants had also paid into court the sum of £10 *per cent.*[k] The question was, whether the defendants were liable to pay any further sum? And the court were of opinion, that they were so liable; and accordingly directed the postea to be delivered to the plaintiff. But the advertisement does not appear to have been at all considered in the judgment pronounced by Lord Kenyon, which, according to the printed report of it, was altogether confined to the question, whether, admitting the master to be liable, his owners were answerable to the plaintiff for his misconduct[l]? Indeed, the case may be considered as having been decided on the ground of the loss or damage having been *eventually* occasioned by the want of proper care and diligence in

[i] Ellis *v.* Turner, 8 T. R. 532. [j] *Id.* 531. [k] *Id.* 532. [l] *Id.* 532, 3.

in the master, in not having delivered the goods at Stockwith, as he might and ought to have done, although the sinking of the vessel was not *immediately* caused by the want of such care or attention; in which view of the case, it fell within the exception in the notice[m].

Notice to be exempt from such loss will not protect owner, if ship be not seaworthy.

A notice not to be answerable beyond £10 *per cent.* for loss or damage happening by want of ordinary care and diligence in the master or crew of the vessel, was held not to protect the ship-owners from an action, where the vessel was not tight or capable of carrying the goods safely, but so leaky that she had nearly sunk in the river before the goods could be unloaded; they being liable, upon an implied contract, to provide a fit vessel for the purpose of carrying the goods. The question arose upon a special case, whether the plaintiffs were entitled to more than £10 *per cent.* upon the damages sustained by the plaintiffs, in consequence of an injury done to their yarn whilst on board the defendant's lighter. That they were entitled to recover to the extent of the *per* centage was admitted; but it was contended on the part of the plaintiffs, that the case did not fall within the terms and meaning of the notice. And the court, upon consideration, were of that opinion[n]. In Lyon and Mells the terms of the notice were as follow: "We will not be answerable for any loss or damage which shall happen to any cargo, that shall be put on board any of our vessels, unless such loss or damage shall happen or be occasioned by want of ordinary care and diligence in the master

[m] *Ante*, 351, 2. [n] Lyon *v.* Mells, 5 East 436, 7.

master or crew of the vessel; in which case we will pay £10 *per cent.* upon such loss or damage, so as the whole amount of such payment shall not exceed the value of the vessel and the freight." The negligence imputed to the defendant being a neglect or breach of duty in the owner of the vessel, and not a neglect in the master or crew, within the exception of such loss or damage as was to be compensated by £10 *per cent.*, it could not be contended to be within that part of the notice stipulating not to be answerable "for any other loss or damage;" for if the defendant had himself made the promise stated in the declaration he would have been liable; and it is impossible, without outraging common sense, so to construe such a notice as to make the owners of the vessel say, "We will be answerable to the extent of £10 *per cent.* for any loss occasioned by want of care in the master or crew, but we will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious;" which would in effect be saying, "We will be at liberty to receive your goods on board a vessel, however leaky, however unfit and incapable of carrying them, we will not be bound even to provide a crew equal to the navigation of her; and if, through these defaults on our part, she be lost, we will pay nothing:" nay, more, "your compensation, in case of misconduct in the master or crew, shall never exceed the value of the vessel and her freight; and therefore by providing a rotten and leaky vessel of little value, we lessen our own responsibility *pro tanto,* in the only event in which we are to be at all responsible." Ridiculous as this supposed state of the agreement must appear, yet these and more absurd stipulations must be introduced into it, if the case of a neglect or breach of duty in the owner of

of the vessel were held to be within it. Indeed that this is the true construction will further appear from the part of the notice respecting additional freight; for it was addressed to those who might be desirous of having their goods carried free of risk "from the act of God or otherwise;" words importing that the thing for which an increased freight was to be paid was properly a matter of risk, and of course might or might not happen to the goods, *i. e.* that which might arise from accident but depended on chance, and not that which was certain, and must inevitably have been the consequence of a defect in the ship, which the carrier had engaged to provide. Every agreement must be construed with reference to the subject matter; and looking at the parties to this agreement, (for so Lord Ellenborough in his judgment denominated the notice), and the situation in which they stood in point of law to each other, it is clear beyond a doubt that the only object of the owners was to limit their responsibility, in those cases alone where the law would otherwise have made them answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against. For these reasons, the court were of opinion that the plaintiffs were entitled to have the verdict entered for the full amount of their damages; and ordered the postea to be delivered to them for that purpose[o].

If loss be occasioned by tortious act of conversion.

However it seems to have been admitted in the case last cited, that notwithstanding such notice be given, and an accident happen within it, the owner of the goods

[o] Lyon v. Mells, 5 East 437, &c.

liability commences and is at an end; and that the master alone is answerable for signing false bills of lading, or delivering goods without indorsement of the bill of lading; though it is a question, if the delivery be to the consignee as factor. So, he is alone liable for his barratry. The liability of the owners of a vessel chartered to the commissioners of the navy, for damage done to another ship, is likewise considered; as also, whether the consignor of the goods is liable to be sued on the bill of lading.

Of the remedies on a bill of lading, in general.

The captain being the only party to a bill of lading, he alone is liable to be sued *upon it;* but yet his owners are in general responsible for its contents, as the captain is their authorized agent; and therefore when he acts within the scope of his authority, his contract is evidence of their obligation. Thus, either the captain or owners are, generally, responsible for the performance of the engagement contained in a bill of lading, and liable to an action for the non-performance of it, or for any misfeazance in the course of the employment of the ship, or otherwise, by which a damage happens to the goods during the voyage, from the time of their being received by the captain, till that of their ultimate delivery according to the bill of lading. The remedy they or either of them have for the freight or other charges, against the owners of the goods, is either by lien or action for such freight, &c. But, being no parties to the bill of lading, they cannot be said to be liable *upon that;* though their shipment and acceptance of the goods under the bill of lading is evidence to shew them bound by the *rates* of freight, &c. stipulated in it. Their liability and contract to pay is however *dehors* the bill itself, and arises

arises from the carriage and delivery of the goods; as rent on a lease for years is said to arise, not by the lease itself, but the subsequent occupation of the land. The remedies for the recovery of freight by lien, or action at law[a], or suit in equity[b], or in the admiralty court[c], having already been considered, as well where they are provided for by the charter-party as where they are not, there is no further occasion for discussing those topics in this chapter.

Where a special action on the case is proper.

It is established, upon principles and authorities, that trover will not lie against a carrier or wharfinger, for a mere non-delivery; it must be a special action on the case, for negligence. So it is, in the case of the owner or master of a ship. It is impossible to make a distinction between them, unless that in the latter instance the rule holds more strongly, as the bill of lading is an express contract. They both receive the goods upon a bailment. A bare omission to deliver them therefore, is no injurious conversion, for which alone trover lies[d]. The owner or master may it seems be charged on the bill of lading, either in an action on the case for the tort or neglect, or for the breach of the contract of the master entered into by him; and which is equally binding on the owner as the master. The only difference is, that the owner is chargeable upon the *implied* contract by operation of law, in respect of his property in the ship and interest in the employment of it; whereas the liability of the master arises out of his *express* contract evidenced

[a] *Ante*, chap. X. XI. [b] *Id.* chap. XII. [c] *Id.* chap. XIII. XIV. XV. [d] *Anon.* Salk. 655. Ross *v.* Johson, 5 Burr. 2825. Dewell *v.* Moxon, 1 Taun. 391.

denced by the bill of lading. The former, perhaps, is not liable in case of loss by the act of God or the king's enemies, whether those perils are specially excepted in the bill of lading or not; but it is clear that the latter is liable in all cases, unless for the exceptions in the bill of lading. And so much are these deemed part of his express contract, that I understand it has been ruled that if they are not mentioned in the declaration against the master, it is a fatal variance; though the decision is not reported. The case is very different from that of Clarke and Gray[e], where it was held unnecessary to notice in the declaration that part of the contract which merely regulated the amount of the damages; the exceptions in the bill of lading forming a material condition as to the performance of the contract, and not merely affecting the amount of *damages* to be recovered in the event of a breach, but limiting the *obligation* originally and necessarily created by the contract itself.

Where trover, or detinue.

Where there is an actual conversion of the property by the defendant, or a demand and refusal of the goods, whilst he has them in his possession, or the like, (which is evidence of an actual conversion of them by him,) trover is the proper form of action[f]. So, where he holds them under an invalid claim of lien himself, or right of stoppage *in transitu* by the consignors or vendors, trover lies; as appears by all the cases on the subject. If the action be not brought upon any contract, but merely in assertion of the plaintiff's property in the ship or goods, and his object be

[e] 6 East 564. [f] Salk. 655. 5 Burr. 2825. 1 Taun. 291.

be to recover the specific property itself, he must bring detinue; but if his object be only to recover damages in respect of the ship or goods, the more usual and convenient form of action is trover. If he sue in the latter form of action, he may at the same time declare upon the custom of the realm for a breach of the duty arising out of the bill of lading, without adverting to any contract express or implied; but if he declare in *assumpsit* upon the contract, a count in trover cannot be added, as that would be a misjoinder of action. These actions of detinue or trover may also be used for the recovery of the charter-party itself, or the bills of lading, or damages for the detention of the one or the other by the defendant, in case of their being improperly withheld or used by him. But one part-owner of a ship or other personal chattel cannot bring trover against the other, unless there has been an actual destruction of the thing in question by that other; for nothing less can constitute an unlawful conversion of the property, where each party has the absolute and uncontrouled use of it. In trover against the captain, for refusing to deliver the goods according to his bill of lading, it is not sufficient to prove a mere non-delivery; but the plaintiff must prove an actual conversion, by shewing either that the defendant has actually converted the goods to his own use, or that he had them in his possession when he refused to deliver them, and that his freight and charges are paid; for as he does not obtain the possession of the goods by tort, but by bailment for the purpose of carriage, his non-delivery is only evidence of a breach of contract or duty, in not carrying the goods safely, and not of a wrongful conversion of

them to his own use[g]. In the case of Johnson and Greaves, it was said by Mansfield, C. J. that it was the captain's duty to deliver up the goods immediately on the ship's arrival, and it seems to have been thought that he would be liable to an action of trover at the suit of the freighters, if he had not done so[h]. But the more proper form of action by them in that case appears to have been on the charter-party. Nor is it quite clear that Dicks and Co. could have maintained trover, in opposition to the general right of property in the freighters or original consignees of the goods, by virtue of the bills of lading delivered to them by the captain, (as they were) without competent authority in him to dispose of the goods. The circumstances of that case are very extraordinary, so as hardly to furnish a guide in any other.

Who must sue on bill of lading. The owner of the goods.

If goods are consigned by bill of lading to A. generally, he is the owner, and must bring the action against the master of the ship, if they are lost. So if the bill be general to A. and the invoice only shews, that they are upon the account of B., the action should be brought by A.; for the property is in him, and B. has only a trust. But if the bill of lading be special, for the delivery of the goods to A. to the use of B., the latter must bring the action[i]. In the case cited from Lord Raymond, and which has been recognized and acted upon in all the subsequent cases, Lord Holt is reported to have said, that the consignee of a bill of lading has such a property that he may assign

[g] *Anon.* 2 Salk. 655. [h] 2 Taun. 358. [i] Evans *v.* Marlet, 1 Ld. Raym. 271, and see 4 Burr. 2051. 1 T. R. 216.

assign it over[j]. The meaning of this passage seems no more than this, that the assignee of a bill of lading, by indorsement from the consignee *bonâ fide and for a valuable consideration,* has such a property in the goods, that he may bring an action against the master of the ship for non-delivery, the same as the consignee himself might have done before the assignment.

Who cannot. An agent, to whom indorsement is made without consideration.

It seems that the mere indorsement of a bill of lading to an agent, to enable him to receive the goods on account of his principal, *without any consideration,* will not enable such agent to maintain an action of trover in his own name for the value of the goods[k]; for no decision of a court of law, upon the subject of bills of lading, has gone further than to say, that the assignment of a bill of lading by the consignees, for a valuable consideration, and without notice to the party taking it of a better title, passes the property in the goods consigned. The analogy between bills of lading and bills of exchange has not been carried further than it was in the case of Lickbarrow and Mason, viz. that an indorsement of a bill of lading, for a valuable consideration and without notice to the indorsee of a better title, passes the property[l]. In the case cited, the indorsement of the bill of lading to the agent, was no more than the shipper's authority to the captain to deliver the goods to such agent. The object in making it was only to enable the agent to take possession of them on account of the

[j] 1 Ld. Raym. 271. [k] Coxe *v.* Harden, 4 East 211. [l] *Id. Per* Lord Ellenborough, C. J.

the shippers, as a matter of precaution in case of insolvency[m]. In a subsequent case, a similar question occurred before Lord Ellenborough at *nisi prius*, in an action of *assumpsit* brought by the plaintiff as indorsee of a bill of lading, for a quantity of butter shipped at Sligo by one Everard, on board a ship whereof the defendant was master, to be delivered to the shipper's order or assigns. It appeared that the plaintiff was merely Everard's agent employed to stop the goods *in transitu*, on account of the insolvency of Baggott and Co. the consignees. It was contended by the defendant's counsel that the action could not be maintained by the plaintiff, who, being an indorsee without value, had no property in the goods; and the case of Coxe and Harden was cited as an authority. The counsel for the plaintiff contended that his client, as indorsee of the bill of lading, must be taken to have the legal property of the goods; and they distinguished this case from Coxe and Harden on the ground that that was an action of trover wherein the right of *property* came into question, but the plaintiff in the present case had declared for a breach of the defendant's *contract*, according to which he was to deliver the goods to the assignee of the shipper. But Lord Ellenborough was decidedly of opinion that the plaintiff, as indorsee of the bill of lading without value, had not the legal property in the goods. He observed, no case has gone so far as to decide, that a bill of lading is transferable like a bill of exchange, and that the mere signature of the person entitled to the delivery of the goods *primâ facie*

[m] Coxe *v.* Harden, 4 East 211, *per* Lawrence, J.

facie passes the property in them to the indorsee. Much confusion has arisen from similitudinary reasoning upon this subject. There must be value upon the indorsement of a bill of lading, or no property in the goods is thereby transferred. The right to stop goods *in transitu*, is a personal right of the seller, and cannot be thus assigned to another. The action, if maintainable at all, should have been brought, not in the name of the agent, but of the consignor himself[n]. His lordship said it made no difference whether the form of action was trover or *assumpsit*. If no property passed to the indorsee, he could have no right to complain of the non-delivery, or of the conversion of the goods, as an injury to himself. The plaintiff was accordingly nonsuited[o]. Mr. Campbell, in a note subjoined to his report of this case, observes, that the promise contained in the bill of lading was made, not to the plaintiff, but to a third person, viz. the consignor of the goods. The plaintiff was not privy to such promise, and there was no consideration for it's moving from him to the defendants; for which reason a breach of it could afford him no cause of action[p].

If vessel be let out by freighter as a general ship, owner is not liable to lessees for non-delivery.

If the registered owners of a ship charter her for the voyage to another person, who puts her up as a general ship, the former are not liable to a third person for the non-delivery of the goods; at all events in order to charge the owners with the non-delivery of goods shipped on board her, the plaintiff must prove that they were received on board by some person appointed

[n] Waring *v.* Cox, 1 Camp. 370, 1. [o] *Id.* [p] Crow *v.* Rogers, 1 Str. 592. Browne *v.* Mason, 1 Vent. 6. 1 Camp. 371, a.

pointed by the defendants. In an action for non-delivery of oats shipped on board the Trafalgar, whereof the defendants were registered owners, it was proved that they had chartered her for this voyage to one De Beur, who had put her up as a general ship; and there was no evidence that the oats had been received on board by any person appointed by the defendants. Lord Ellenborough held, that the registered owners of the ship were not, under these circumstances, liable for the non-delivery of the oats; and directed a nonsuit[q]. In a previous case Lord Kenyon appears to have held the same doctrine, on the ground that the liability was shifted by the charter-party, from the owners to the charterers, who were for that voyage to be deemed the owners, and the captain their agent *pro hac vice*[r].

Nor is captain liable to such lessee for bad stowage. *Quære*, if assignee of freighter can sue in such case?

The freighter of a chartered ship is the only proper person to bring an action against the captain for negligent stowage, although the latter has signed bills of lading for delivery to a third person; who is in such case to be considered merely as the agent of the shipper. An action was brought by one Moores, against the captain of a ship for negligence, in stowing a cargo of currants brought from Zante to England. The defendant had entered into a charter-party with one Partridge, by which he had agreed to receive from and deliver to him the cargo, which Partridge had agreed to procure and ship on freight. But he had signed a bill of lading, stating the goods to be shipped by one Strange,

[q] Mackenzie *v.* Rowe, 2 Camp. 482. [r] James *v.* Jones, 3 Esp. Rep. 27.

Strange, by order of Rovedino of Venice and Moores of Leghorn, to be delivered to the order of the latter, for freight to be paid according to the tenor of the charter-party. The jury said they had no doubt Moores was only an agent; and on its being objected that the action was improperly brought in his name, the plaintiff was nonsuited. On a motion to set aside this nonsuit, the court (*absente* Sir James Mansfield, C. J.) thought that the action ought to have been brought in the name of Partridge; that the captain, by the charter-party, was bound to receive his cargo from the agents or assigns of Partridge, and from no one else. They observed that it did not appear that any assignment had been made to Moores, so as to constitute him an assignee, and the bill of lading was therefore perfectly consistent with the charter-party to which it referred; they also observed, that it was easy to understand why the action was brought in the name of a person living at Leghorn. They thought the nonsuit right, and discharged the rule[s]. The question remains, whether if Moores had been assignee, he could have brought the action? The laws of Oleron and Wisby contain no particular directions as to the affreightment of ships; but by one of the laws of Wisby, it is declared not to be lawful to sell or engage a ship freighted, though one may freight her to another for the same time and the same voyage[t].

Captain or owners, unless for exceptions, liable for all losses, &c.

The liability of the captains of merchant vessels arising by special contract[u], they are, unless for the exception in the charter-party or bill of lading, even under

[s] Moores v. Hopper, 2 N. R. 411. [t] Leg. Wis. 10. [u] See Al. 29, 8 T. R. 267.

der greater responsibility than common carriers, who are not liable for the losses or accidents happening by the act of God or the king's enemies, although they are in general responsible for all other losses, &c. however inevitable, whether by the act of themselves or of strangers. The act of God is a natural and inevitable cause, such as winds, storms, &c. Accidents happening by the king's enemies may or may not be inevitable, according to circumstances. But if the accident do not happen from either of these causes, though it may be inevitable, the carrier is liable. The instance of his liability for a robbery is very strong; and any other injury by a private person, to which the carrier is not privy, is within the reason of the case of robbery: the carrier is therefore liable. Where there is negligence, no doubt can exist as to his liability; as, where the vessel, in which the goods were, sunk by driving against an anchor in the river, though no buoy was to be seen; for there should have been on that account a greater degree of caution[v]. Convenience as well as public policy require this doctrine to be adhered to; for it will induce carriers to be more careful. If it were otherwise, and any accident were to happen to goods by the misconduct of a third person, they would give themselves no trouble about them[w]. There is no difference between a land and water carrier[x].

Whether merchants insure or not is immaterial.

Though it is usual for the merchant to insure, yet if he neglect to do so, that does not free the carrier from responsibility, or vary his obligation. The merchant is not bound to insure. Neither is it to be presumed

[v] *Per* Lord Mansfield, in Trent Navigation *v.* Wood, 3 Esp. 127. 131.
[w] *Per* Ashhurst, J. *Id.* 131. [x] *Per* Buller, J. *Id.* 132.

presumed that because the price of insurance is low, the risk is excluded when not insured. The carrier knows the degree of danger he is to inçur, and may proportion his premium accordingly[y]. So, in the case of the captain or owner of a ship, although it is customary for the consignor or consignee to insure the goods; yet whether they be insured or not is nothing to the captain, unless indeed the insured recover his loss of the underwriters, in which case he cannot obtain a double compensation for the same loss, by suing the captain or owners. But as this is not a case of election, by taking his remedy against the underwriters, he is not prevented from resorting to the charter-party or bill of lading, for any damages beyond the amount of his insurance.

Although the owner and captain of the ship are, in general, both responsible for the delivery of the goods according to the bill of lading, yet their liability is several and not joint; therefore although the plaintiff may sue either of them separately, or perhaps bring separate actions against both at the same time, yet he cannot sue them together as upon a joint contract. The plaintiff, in his first count, declared against one of the defendants as owner of the ship and the other as master, stating that he had at *their* request put on board the cargo, to be carried free of freight; that the vessel sailed and arrived, but that *they* refused to deliver the goods. It appeared in evidence that the master only had signed the bill of lading as usual, and it contained the word "*franco*," meaning

Liability of owner and master is several, and not joint.

[y] *Per* Buller, J. 3 Esp. 132.

ing that the goods were to be freight free. The owner had unloaded the goods, and tendered them on payment of freight, which was refused; and at the time of the trial they continued in his possession. Mansfield, C. J. was of opinion that the plaintiff had not established the contract alledged in the first count of the declaration [z]. It is true the bill of lading in this case was for the carriage of the goods "freight free;" but if it had been otherwise, it would have made no difference, for the above reason.

When liability ceases.

Where goods are arrived and deposited at the inn, they cannot be taken away by means of a foreign attachment, or the like; nor can the carrier be liable as such after the goods are got to the end of their destined journey, however he may be liable as warehouse-keeper, in respect of the recompence he is to receive for warehouse room. And the instant actual possession is taken of the goods by the consignee or his representative, the warehouseman becomes the agent or servant of the consignee [a]. But if the goods are properly directed and capable of delivery, it seems that it is the duty of the carrier, as such, to deliver them according to the direction [b]. We have before seen by what delivery of the goods, the liability of the captain or owners of the ship attaches and commences [c]; and it has been held, that if goods are delivered to a carrier, to be carried to one place and from thence forwarded to another, and after they have arrived at the first place, they are deposited by the carrier in a warehouse for safe custody, he is liable for any accident

[z] Dewell v. Moxon, 1 Taun. 391. [a] *Per* Ashhurst, J. in Ellis v. Hunt, 3 T. R. 469. [b] *Ante*, 82, 3. [c] *Ante*, 36.

accident happening to them whilst they remain there, the same as if it had happened in the course of their carriage to that place[d].

Action lies against captain, for signing false bill of lading.

A bill of lading is an acknowledgment by the captain of having received the goods on board his ship; therefore it would be a fraud in the captain to sign such a bill if he have not the goods on board, and the consignee would be entitled to his action against the captain for any damages he may sustain by the fraud[e].

For delivery, without indorsement of bill of lading, *Semb.*

The case as between the captain and the shippers, and between the latter and the consignees of the goods, is very different; the captain may sign bills of lading in such terms as do not entitle the vendees to call upon him for delivery of the goods under them, as, if the bills be to the order of the shippers, and that one transmitted to the vendees is not indorsed; in which case it seems, that neither the shippers nor their agents can sue the captain for non-delivery. On the other hand, if the captain without an indorsement actually deliver the goods to the consignees, the shippers may, it seems, maintain an action against the captain for so doing; for such bills of lading are an undertaking by the captain to deliver the goods to the order of the shippers only, and he is therefore answerable to them for the breach of that contract; but if once the consignees get possession of the goods, whether rightfully or wrongfully from the captain, the right of stoppage *in transitu* ceases, and the property is

[d] Garside *v.* Trent and Mersey Navigation, 4 T. R. 581. [e] *Per* Buller, J. 2 T. R. 75, 6.

is indefeasibly vested in the consignees or vendees, without any further controul of the shippers over it[f].

Qu. Delivery to consignee as factor?

It seems from what fell from Ashhurst, J. in delivering the opinion of the court in Kinlock and Craig, that although the captain has no right to deliver the goods to the consignee, as owner, without an indorsement of the bill of lading, he may yet deliver them to him in the quality of factor. "If," said the learned judge, "the captain had in fact delivered the goods to the consignee, he must have delivered them to him in the quality of factor. He had no right to deliver them to him as owner, without an indorsement of the bill of lading[g]." In that case, it appeared that the consignor used to send cargoes of goods to the consignees as factors, and that bills of lading were sometimes indorsed, but more generally not; and the bill of lading of the cargo in question, which had been sent with the invoice, was unindorsed, and the consignees had become insolvent before they had taken possession of the goods, of which they informed the captain; so that it does not seem that he could be justified in delivering the cargo to them in any character, though they had afterwards paid him a small part of the freight. But independently of the bankruptcy, there could be no doubt but that the captain had a right to deliver the goods to the consignees, as he usually had done, though the bill of lading was not indorsed; and whether he delivered the goods to them as owners or factors seems to make little or no difference. Certainly the invoice and letter of advice, and not

[f] Coxe *v.* Harden, 4 East 211. [g] 3 T. R. 123.

not the act of the captain, would bind the consignor in that respect.

The owners of vessel, chartered to commissioners of navy are liable to be sued as such, by third persons.

The owners of a vessel, by whom the master and crew are appointed and paid, are liable to an action for an injury done by running foul, in consequence of the misconduct of the persons on board in having too much cable out; although the vessel at the time of the accident were under charter to the commissioners of the navy, and she were then under the command of an officer put on board by the commissioners, and had also on board a king's pilot, who at the time acted as such, and gave orders to the seamen accordingly[h]. In delivering the opinion of the court on the point (which was reserved at the trial), Sir James Mansfield, C. J. observed, that it was difficult to say that it was not to be considered as the defendant's ship, with regard to all the world except the commissioners of the navy. They had appointed the master and sailors, and continued to pay them. The only ground on which a contrary doctrine could be contended for was, that the ship, though in their possession, was under the command of a superior officer, whose orders the master was bound to obey. But that argument would go the length of shewing, that the owners, by taking a man on board belonging to the freighters, could thereby exonerate themselves from their responsibility: which cannot be. The officer was taken on board by their agreement, with which strangers could not be supposed acquainted; nor could they ascertain whether the damage arose from the act of the master and crew, or of the officer put

[h] Fletcher v. Braddick, 2 N. R. 182.

put on board by the commissioners; even supposing that the latter had the management and navigation of the ship, and not merely power to direct to what place it should be navigated, for the purpose of being employed against the enemy; which, upon the charter-party, appeared doubtful[i].

No action lies against consignor, on bill of lading.

In the case of Lickbarrow and Mason, it was argued that no action could be maintained on a bill of lading, by the holder of it against the consignor; and it seems that argument is well founded, no special action on the bill of lading having ever been brought against him; for if the bill of lading transfer the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is the proper form of action. If the price of the goods be claimed by the vendor against the vendee, between whom a bill of lading has passed, the proper action is for goods sold and delivered[j]. With respect to any remedy on the bill of lading or contract evidenced by it, that should be enforced by the person who has the general property in the goods[k]; and the bill of lading can only be made a ground of action, against the captain who is the party, or his owners who are by law deemed privy to it. The right of action for the freight, where there is no charter-party under seal, is not so much on the bill of lading, as the performance of the contract evidenced by it. As against the shipper, or his consignees or assignees, it is only evidence of the rate or quantum of freight due.

It

[i] Fletcher *v.* Braddick, 2 N. R. 186, 7. [j] *Per* Buller, J. 1 T. R. 5. [k] 8 T. R. 330.

Subject of remaining part of this chapter, how treated.

It now remains to make such observations as occur upon the declaration and pleadings, in actions on bills of lading. With respect to the former of these considerations, it will be shewn when the plaintiff must declare on the custom of the realm, or the special contract between the parties; the necessity, or rather the absence of any necessity for reciting the custom, where that is made the ground of the action; and what is or is not a sufficient statement of the contract, where that is declared upon, as to the statement of the reward, the delivery of the goods, their description, and the voyage; and where a count in trover, or for money had and received, may be added. There is little matter for observation respecting the pleadings to such declarations, as the general issue of not guilty, or *non-assumpsit*, will be found to be the only necessary or proper plea for the defendant; the special form of pleading which was once observed in these actions, being now quite out of use.

Declaration against owner must be laid on the custom, or on a contract for hire.

If the plaintiff declare in an action on the case against the owner of a ship, on his undertaking for the carriage of the goods and his refusal to deliver them, the declaration must allege, (and if the jury find a special verdict, it must state) either that the ship was employed according to the custom of the realm, or that she was a vessel usually carrying goods for hire. It is not enough to state that the goods were to be carried for freight, and that the defendant received them to be carried safely; for if a ship be sent for a particular purpose, and not in the general way of trade, the master cannot take in goods to charge the owners. As to the custom of the realm, it is not now necessary it should be set out in the declaration, though all the old entries are so;

 for

for that is part of the common law. And upon general verdicts, the court will take the case to have been fully proved. But if you do not state a delivery to charge the owners, it is an objection to the declaration; and upon a special verdict, the court can only take the facts to be as they are found; and the finding that freight was payable, is no more than evidence that it was a carrying for hire, and not a finding of the fact, of which alone the court can take notice[l]. However it may be remembered, that although in order to charge a carrier with a mere non-feazance or non-performance of the contract, a reward must be shewn to do the thing contracted for, and he is not liable without such reward, yet if he be guilty of a misfeazance, he may be charged for that, though he was to have no reward[m]. Consequently no reward need be stated in the declaration, or proved at the trial to have been contracted for.

Recital of the custom, unnecessary.

It is said, that although the declaration in an action on the case against a common carrier, upon the custom of the realm, may be good without a recital of the custom, yet it is better to recite it[n]. However it is a long time ago since this observation was made; and none of the modern precedents, that are well settled, contain a recital of this nature, which is clearly unnecessary and better omitted; for the custom of the realm is the law of the land, of which the judges will take notice, without statement or proof. Therefore where the plaintiff does not declare on the contract in *assumpsit*, but in case, on the duty arising out of the custom

[l] Boucher v. Lawson, Ca. temp. Hardw. 185. 194. [m] *Ante*, 359.
[n] Matthews v. Hopkins, 1 Sid. 244.

custom of the realm, it is in general sufficient, without stating what that custom is, to allege directly, after stating the bailment such as it was, that it was "thereupon the duty of the defendant" to do what he has neglected, and then shew how he has neglected or failed in the performance of that duty; which is all that is necessary.

What deemed an insufficient statement of the contract.

A count in an action on the case, stating that, the defendants being owners of a ship at L. bound on a voyage from thence to W. the plaintiffs shipped goods on board to be carried upon that voyage by the defendants, and to be delivered at W. to the plaintiff's assigns; and thereupon the plaintiffs insured the goods at and from L. to W.; and then averring that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from L. to W. without deviation; and alleging a breach of such duty, by their causing the ship to deviate from the course of that voyage; after which she was lost with the goods, and the plaintiff, by reason of such deviation, lost his property and the benefit of his policy, &c.; cannot be maintained; for want of alleging that the goods were delivered to, or received by the defendants, for the purpose of carriage, or that they had notice of the shipment, from whence a promise or duty, founded upon an agreement to carry the goods, might be inferred; and also for want of an allegation that the defendants undertook to carry the goods directly to W., from L., for though the ship's ultimate destination might be W., yet she might have been first destined to other places[o].

It

[o] Max v. Roberts, 12 East 89.

Need not state a certain sum for reward.

It is not necessary, in an action of this nature, to state that the plaintiff agreed with the defendant to carry the goods for a certain sum; for a carrier may declare upon a *quantum meruit* as a tradesman may, and therefore he may be charged as such without shewing any agreement for a certain reward[p]. Some of the cases about to be cited are those of declarations against land-carriers; but the principle of them is equally applicable to the statement in declarations against captains and owners of ships, and other carriers by water.

How the delivery may be stated.

The plaintiff may declare, stating that the defendant being a common carrier between Hull and London, the plaintiff delivered goods to him in York to be carried from Hull to London, and he lost them: for he shall be charged upon his general receipt at York, according to Southcote's case, although nothing is said of their carriage from York to Hull[q].

A misdescription of the voyage is fatal.

But if the defendant's duty and the journey he is bound to perform, be misdescribed, it is a fatal variance; as, if the defendant be only a carrier from A. to B., and is described as being a carrier from A. to C., a place beyond B. Where the defendant was alleged to be a common carrier from Marlborough to London, and it was charged that he did not deliver the goods at London, though he never came so far, but only to St. James's market, where he took the goods up when he went towards Marlborough, it seems that the exception (which was not observed) would otherwise have been fatal; for the defendant was not such a carrier as stated, nor his duty such as described in the declaration, and the *terminus*

[p] Nicholls v. More, 1 Sid. 36. Bastard v. Bastard, 2 Sho. 81. S. P. [q] *Id.*

terminus ad quem of the journey was also misdescribed[r]. But if the defendant's duty be described within the real compass of it, the case would perhaps be otherwise; as, if he were a carrier from A. to C., and he were described as a carrier from A. to B., having been in fact hired and paid for carrying that distance only, and the loss of the goods were proved to have taken place within that distance. And at this day, a judge at *nisi prius* would it seems be inclined to hold that, St. James's market, being in the metropolis of London, though not in the city, the defendant might well be charged as a carrier to London, though he should go no farther than the market.

It seems that the declaration in an action of this nature must describe the goods with the same certainty as is necessary in trover[s]; but if they are described with that certainty it is sufficient[t]. And it is usual and proper to state the goods to be the plaintiff's, and to specify their value, though perhaps the former may be unnecessary, as there is a bailment. The loss of the goods should also be described with certainty. But there is this distinction to be observed, that in an action on the case for damages, although if the goods are mentioned separately, they require but little accuracy of statement, and if they be described as contained in chests or packages, or the like, which identify them, that is sufficient ; yet in replevin or detinue, where the goods themselves are recoverable, they should, in the former case, be described with greater certainty. Almost any general description will suffice in

Of describing the goods, &c.

[r] *Semb.* Lovitt *v.* Hobbs, 2 Sho. 129. [s] Com. Dig. *tit.* Action on the Case for Negligence, c. 2. [t] Chamberlain *v.* Cooke, 2 Vent. 78.

in other actions, where not the goods themselves, but only damages for their value are recoverable.

Where a count in trover may be added.

In Matthews and Hopkins, where the plaintiff declared in case against a carrier, and in trover for the same sum, it was objected that a count in trover could not be joined with a count against a carrier, because the one was founded on tort and the other on custom; and the court held the declaration and verdict bad; for although not guilty may be pleaded to both, yet the verdict could not be for the plaintiff generally[u]. And this case is supported by subsequent authority[v]. But in a modern case Mr. Justice Buller observed, that the common way of declaring against a carrier now is in *assumpsit*, to which trover cannot be joined, but if the plaintiff declares on the custom of the realm, a count in trover may be added; it only depends on the *form* of the action[w]. On the other hand, if he declares in *assumpsit*, there is the advantage of adding a count for money had and received; though the adoption of this form of remedy lets in the defence of a sett-off, which cannot be taken advantage of in an action of tort.

Not guilty.

In actions of this nature, in former times, the defendant pleaded particularly to the neglect; but it has been ruled that not guilty is a good plea[x], which appears to have been expressly acknowledged in the case of Matthews and Hopkins, before quoted from Siderfin.

Non-assumpsit.

Although it cannot now be doubted that the defendant

[u] Matthews v. Hopkins, 1 Sid. 244, 5. [v] Dulston v. Janson, 5 Mod. 90. [w] Brown v. Dixon, 1 T. R. 275. [x] 5 Mod. 92.

fendant *may* plead not guilty[y], it seems that he is not confined to that form of plea; for where in an action on the case against a common carrier, for detaining the plaintiff's goods till they were spoiled, upon *non-assumpsit* pleaded the plaintiff had a verdict, on a motion in arrest of judgment, the court said, that the action was founded on the general custom of the realm, and on that *assumpsit* which is implied by law on the carrier's receiving the goods, to keep and deliver them safely; and *non-assumpsit* is a proper plea, and the issue proper enough; and judgment was given for the plaintiff by Pratt, C. J., and Eyre, J.[z]

If the defendant plead a discharge from carrying the goods, that is traversable.

Where the plaintiff declared that the defendant was a common bargeman, and used to carry for hire from London to Milton, and other places in Kent, and that he delivered a portmanteau containing a certain sum of money, and paid him so much for the carriage, but that the defendant so negligently kept it, that it was taken from him by persons unknown and lost; to which the defendant pleaded, after confessing the receipt of the goods, and that he was a common bargeman, that he, fearing to carry the portmanteau, delivered it to J. D. for the purpose of carriage, and gave notice thereof to the plaintiff, who agreed thereto, and discharged him of the carriage; and the plaintiff traversed the discharge; upon demurrer it was adjudged for the plaintiff: for the delivery by his assent was not material, and the only matter traversable or issuable was the discharge[a].

When

[y] Com. Dig. *tit.* Action on the Case for Negligence, c. 3. [z] Harrison *v.* Green, 8 Mod. 178. *Sed quære?* [a] Beck *v.* Kneeland, Cro. Jac. 330. Hob. 17, 18. S. C.

Special pleading not of use in actions of this nature.

When the defendant used to plead specially, as he did formerly in actions of this nature, it frequently gave rise to questions of pleading, and particularly as to whether the matter of the plea amounted to the general issue or not; and if the general issue was pleaded in those times, it was often doubted whether special matters of defence could be given in evidence under it. But it is now quite clear and every day's practice to plead nothing but the general issue, and give the circumstances of defence in evidence, whether the action be case or *assumpsit;* both of which being actions *on the case*, any circumstances amounting to a defence are certainly admissible under such plea, whether they go in negation, or in justification or discharge of the plaintiff's claim; unless indeed it be the statute of limitations, which, whenever it is meant to be relied on, is always pleaded specially.

PART III.

OF

STOPPAGE IN TRANSITU.

CHAPTER I.

OF THE NATURE AND GROUNDS OF THIS RIGHT, AND BY WHOM IT MAY BE EXERCISED.

THE consideration of the duties resulting from a bill of lading, as well as the remedies to enforce those duties, were so materially connected with the doctrine of stoppage *in transitu*, that it was thought a compilation of the cases on that subject would form a useful addition to this work. They are so numerous as to form a separate part of it by themselves. In the present chapter, it is intended to consider, first, the nature of the right in question, as between the consignor and consignee of the goods, and the grounds on which it depends; secondly, who may exercise it as, the *consignor*, or vendor, where goods are purchased by one person of another to sell to a third for commission, or are consigned for sale on the joint account of the consignor and consignee; and the difference which there is between such a person and a mere surety for the price; how far an alien enemy may stop the goods as vendor, by virtue of a licence granted

Contents of chapter.

granted to British merchants to purchase and import them; thirdly, under what circumstances a principal may stop goods *in transitu* to his factor, or a factor may reclaim goods after having once parted with his lien; and finally, whether a *consignee* may take possession of the goods *in transitu*, and the obligation he is under to shew the fairness of the sale to him, when he claims under one who has defrauded the real owner of the goods; in what cases it has been held by Lord Kenyon, that the consignee cannot take possession of the goods before the completion of the voyage, as, on the vessel's coming out of port, or whilst she is at sea, or in quarantine; and the chapter will be concluded with some remarks on the distinction which has been taken between land and sea carriage, as to stoppage by the consignee before actual delivery. The right of stoppage *in transitu*, as against the assignee of the goods, by indorsement of the bill of lading, or otherwise, will be fully considered in a separate chapter.

Right of stoppage *in transitu*, as between consignor and consignee.

As between the original consignor and consignee, it is now clear, that the consignor has a right to seize the goods, in their transit or passage from the consignor to the consignee, if the consignee become insolvent before the actual delivery of them; which right is called the right of stoppage *in transitu*. This is now well known, and established by law; though it was not always so. The first case of this sort arose in Chancery, when the Chancellor ordered an action of trover to be brought, to try whether a consignment vested the property in the consignees, and it was then determined in a court of law that it did; whereupon the Chancellor thought

thought it right to interpose and give relief. And since that time it has always been considered, at law and in equity, as between the original parties, that the consignor may seize the goods, before they are actually delivered to the consignee, in case he becomes insolvent before the actual delivery [a]. In the famous case of Lickbarrow and Mason, this point was conceded by the plaintiff's counsel, without argument, and therefore may now be considered quite settled [b]. The point appears to have been previously determined at law more than once [c].

Reasonableness of the right.

It cannot be denied but that this right is a most reasonable one. All judges have agreed in this; though they have differed upon the question whether it is founded upon legal principles, or upon mere equitable grounds. In the case of Snee and Prescot, Lord Hardwicke said, though goods are even delivered to the principal, he could never see any substantial reason why the original proprietor, who never received a farthing, should be obliged to come in a creditor only for a small dividend; unless the law goes upon the general credit the bankrupt has gained by having them in his custody [d]. But whilst goods remain in the hands of the original proprietor, there is no reason why he should not have a lien on them till he is paid; or why a person who has advanced money upon them

[a] *Per* Grose, J. 2 T. R. 76. And see Wiseman *v.* Vandeput, 2 Vern. 203. Snee *v.* Prescot, 1 Atk. 245. And D'Aquila *v.* Lambert, Amb. 399. [b] *Id.* 64. [c] Assignees of Burghall *v.* Howard, cited by Lord Loughborough, 1 H. B. 365, 6. Hunter *v.* Beal, cited by Buller, J. 2 T. R. 75. Savignac *v.* Cuff, cited *arguendo*, *Id.* 66. See also Hibbert *v.* Carter, 1 T. R. 745. [d] See 3 B. & P. 473, *per* Chambre, J.

them should not have a lien till he is reimbursed his advances[e]. In Lickbarrow and Mason, Mr. Justice Buller observed, that the cases between the consignor and consignee have been founded on principles of equity, and have followed up the doctrine of Snee and Prescott; for if a man has bought goods, without paying, and cannot pay for them, it is not equitable that he should prevent the consignor from getting them back again, if he can do it before they are in fact delivered[f]. The reasonableness of his being permitted to do so, is too obvious to need further comment.

This right depends on legal grounds.

But it must not be considered that the right of stoppage *in transitu* rests merely on equitable grounds, or that it has not been admitted at law[g], or that it has only been so admitted because it had been previously enforced in a court of equity; for in the case of the assignees of Burghall against Howard, before Lord Mansfield, the right of stoppage *in transitu* is considered not merely as an equitable but a legal right; and in the famous case of Lickbarrow and Mason, (to which it will be necessary to make frequent reference), Lord Loughborough said, "I take it to be a clear proposition, that the vendor of goods not paid for may retain the possession against the vendee, not by aid of any equity, but on grounds of *law*. Our oldest books[h] consider the payment of the price, (day not being given), as a condition precedent implied in the contract of sale; and that the vendee cannot take the goods, nor sue for them, without tender of the price. If

[e] 1 Atk. 249. [f] 1 T. R. 75. [g] 1 H. B. 365, 6. [h] See Hob. 41, and the Year Book there cited.

If day be given for payment, and the vendee could support an action of trover against the vendor, the price unpaid must be deducted from the damages, in the same manner as if he had brought an action on the contract for the non-delivery[i]. The sale is not executed before delivery; and in the simplicity of former times, a delivery into the actual possession of the vendee or his servants was always supposed. In the variety and extent of dealing which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of their delivery, may all entitle the vendee to act as owner, to assign the goods, and to maintain an action against a third person into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee. He has therefore a complete right, for just cause, to retract the intended delivery, and to stop the goods *in transitu*. The cases determined in our courts of law have confirmed this doctrine, and the same rule obtains in other countries[k]. The case of Lickbarrow and Mason, in which Lord Loughborough laid down the above doctrine, and the several judgments given in that case, including the celebrated judgment of Mr. J. Buller in the House of Lords, form almost as comprehensive and luminous a digest of the law upon this subject, as the famous case of

[i] Snee *v.* Prescott, 1 Atk. 245. [k] *Per* Lord Loughborough, 1 H B. 363, 4.

of Coggs and Barnard[l] does upon the law of bailments, which case constituted the principal groundwork of Sir William Jones's treatise.

So held by Lord Mansfield.

In the *nisi prius* case above alluded to, before Lord Mansfield[m], the right of the consignor to stop the goods *in transitu* is considered as a *legal* right[n] to be exercised against the consignee or his assignees; though it must be confessed that the question only appears to have arisen between the assignees of the original consignee and the captain of the ship, and it may perhaps have turned on the following circumstance which appeared in evidence, namely, that no particular ship was mentioned by which the goods were to be sent, in which case the shipper was to be at the risk of the peril of the seas. The case was this: one Burghall at London, gave an order to Bromley at Liverpool, to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a vessel, whereof Howard the defendant was master, who signed a bill of lading to deliver it in good condition to Burghall in London. The ship arrived in the Thames, but Burghall having become a bankrupt, the defendant was ordered, on behalf of Bromley, not to deliver the goods, and accordingly refused, though the freight was tendered. The plaintiff declared in case upon the custom of the realm, against the defendant as a carrier. And Lord Mansfield was of opinion, that the plaintiffs had no right to recover, saying, he had known it several times ruled in Chancery, that where the consignee

[l] 2 Lord Raym. 909. [m] Assignees of Burghall *v.* Howard, Guildhall Sittings, *H.* 32 *Geo.* 2. 1 H. B. 366. [n] *Ante*, 400.

signee became a bankrupt, and no part of the price had been paid, it was lawful for the consignor to seize the goods before they came to the hands of the consignee or his assignees; and that this opinion proceeded, not upon principles of equity only, but the laws of property. The plaintiffs were, accordingly, non-suited[o].

So considered in modern cases.

Not only has the doctrine of stoppage *in transitu* been so clearly expressed and openly acted upon as a legal right in the foregoing cases, but in more modern ones also, it has always been so considered and treated by the judges, though the contrary has been frequently attempted to be established in argument at the bar, on account, (as it seems), of this doctrine having been first laid down in the court of Chancery. In the case of Mills and Ball, the judges observed that the general rule of *law* was admitted on all hands; the only question in the case, depending upon the application of that rule, was, whether the goods were in point of fact stopped *in transitu*[p]. In the case of Oppenhein and Russell, Lord Alvanley, C. J. speaks of the right of stoppage *in transitu* as one now firmly settled and established, and as much a *legal* right as any other[q]. Heath, J. also says it is clear that the right of seizing *in transitu* is a *common law* right, because it may lay the foundation of an action of trover. It is (he says) a right arising out of the ancient power and dominion of the consignor over the property, which he reserves to himself[r]. Rooke, J. said he

[o] 1 H. B. 366. [p] 2 B. & P. 462, 3. [q] 3 B. & P. 47. 49. [r] *Id.* 49.

he must consider it as a *legal* right, as the courts of common law recognized it. Although a just and equitable right, it is a *legal* right too, and not one which needs the aid of a court of equity[s]. He afterwards speaks of it (as Mr. J. Heath had done[t]) as the *common-law* right of the consignor, paramount to, and therefore not affected by any special agreement between the consignee and carrier[u]. Chambre, J. observed, that if it were merely a right in equity, every thing done in courts of law to enforce it has been wrong; nor did it seem a very precise definition to call it a legal right founded upon equitable principles[v]. And in Dixon and Baldwin[w], Lord Ellenborough, C. J. observed, that the right of stoppage *in transitu* must have been considered as a *legal* right in Bohtlinck and Inglis[x]; for there the consignors maintained trover against the assignees of the consignee, upon a mere demand and refusal of the goods by the captain, before they were delivered.

Not material on what grounds. It will make no difference whether the right is considered as springing from the original property not yet transferred by delivery, or as a right to retain the things as a pledge for the price unpaid. In all the cases, the right of the consignor to stop the goods is admitted as against the consignee, though it was once contended, that the right did not exist as against a person claiming under the consignee, for a valuable consideration, and without notice that the price was unpaid. To support that position however, it was necessary

[s] 3 B. & P. 50. [t] *Id.* 49. [u] *Id.* 52. [v] *Id.* 53. [w] 5 East 180.
[x] 3 East 381.

necessary to maintain that the right of the consignor was not a perfect legal right in the thing itself, but that it was only founded upon a personal exception to the consignee, which would preclude his demand as contrary to good faith and unconscionable. If the consignor had no legal title, the question between him and the *bonâ fide* purchaser from the consignee would turn on very nice considerations of equity. But a legal lien, as well as a right of property, preclude these considerations; and the admitted right of the consignor to stop the goods *in transitu* as against the consignee, can only rest upon his original title as owner, not divested, or upon a legal title to hold the possession of the goods till the price is paid, as a pledge for the price [y].

Difference between this right, and right to rescind the contract.

Lord Kenyon, in the case of Hodgson and Loy, observed, that the right of the vendor to stop goods *in transitu*, in case of the insolvency of the vendee, was a kind of equitable lien adopted by the law for the purposes of substantial justice, and that it did not proceed, as the plaintiff's counsel supposed, on the ground of rescinding the contract [z]. And although Lord Ellenborough, in the subsequent case of Dixon and Baldwin, (where there arose a question of stoppage *in transitu*, by the vendees of the goods, who had become bankrupts), speaks of their competency to rescind, and having in fact rescinded the contract for the sale of the goods [a], yet these opinions are by no means in contravention of each other; the difference between a right of stoppage *in transitu* and a right to rescind

[y] 1 H. B. 366. [z] 7 T. R. 445. [a] 5 East 186.

rescind the contract being this, that the former can only be exercised by the vendor or consignor of the goods, or such persons as may represent him or stand in his situation, but may be exercised by him or them without consulting the consignee or vendee, and without his leave and against his will; but the latter can only take place by the joint consent and concurrence, express or implied, of both parties to the sale or consignment, of which nature was the case of Dixon and Baldwin; though the two rights are frequently confounded together. This distinction will be fully explained and exemplified by the cases cited and commented upon in the last chapter of this part of the work. It is sufficient for the present to say, that Lord Kenyon's observation is quite correct, that the right of stoppage *in transitu* does not proceed on the ground of rescinding the contract, but is perfectly consistent with the idea of its continuance unrescinded.

Who may exercise the right of stoppage *in transitu;* the consignor, vendor, or his agent, &c.

The next consideration is, who may exercise this right of stoppage *in transitu*. All the cases shew that the vendor or consignor of the goods may do so. The rule seems to be, that the person having the present property, and from whom the vendee or consignee would have derived such property if he had continued solvent, or his authorized agent or representative, is the proper person to exercise this right. The authority for that purpose may be created by an express and particular warrant or direction, or may be implied from a general agency, or other circumstances which raise a presumption that the delivery was prevented with the concurrence of the principal. And if the other party do

do not, at the time, question the authority of the agent to act as such, but on the contrary treats him as if he were an authorized agent, he will not, it seems, afterwards be permitted to dispute the fact.

Vendor may, though he purchase the goods of another for commission.

If a trader here give an order to his correspondent abroad to ship him goods, which the latter procures upon his own credit, without naming the trader here, and ships to him at the original price, charging only his commission, yet the correspondent abroad is so far a vendor as between him and the trader here, that on the bankruptcy of the latter he may stop the goods *in transitu*, by procuring the bill of lading from the bankrupt's agent[b]. In trover, by assignees of a bankrupt, the consignee, against the agent of the shipper of the goods, a verdict was found for the plaintiff subject to a case, stating in substance, that Browne the bankrupt, a trader in London, gave an order to Fritzing, a merchant of Hamburgh, to procure and ship for him a quantity of bees-wax; Fritzing purchased the goods of utter strangers to the bankrupt, and shipped them on account and risk of the bankrupt on board a general ship, and drew bills payable to his own order, for the invoice price and commission, informing the bankrupt that he should have credit for them when accepted and negociated. The bill of lading was to the bankrupt's order. The bills were accepted by the bankrupt, who received the invoice and bill of lading on the 10th August; on the 2d September he stopped payment; on the 3d the defendant,

[b] Feize v. Wray, 3 East 93.

fendant, as the agent of Fritzing, obtained the invoice and bill of lading from the bankrupt's brother, when he delivered them over to Yates and Co. to sell the goods at his agents. The ship arrived and was entered at the custom-house on the 11th September, when Yates and Co. sold the goods on the defendant's account to one Pilgrim. Fritzing confirmed the sale thus effected, and negociated the bills received from the bankrupt with one Karsten, and received the amount from him, and gave credit for it in account with the bankrupt; but the bankrupt, at the time the wax was purchased and shipped, was indebted to Fritzing in a much larger sum than and exclusive of the price of the wax, on the general balance of accounts. The bills were proved under the bankrupt's commission. Under these circumstances it was contended, that no relation existed between Fritzing and the bankrupt, on which the right of stopping the goods *in transitu* could attach, and that Fritzing was a mere factor, purchasing on behalf of his principal, and as such had only a lien for his general balance, so long as the goods remained in his possession. But it was observed by Lord Ellenborough, (who, being engaged in the cause whilst at the bar, did not take part in the discussion, though he expressed his entire concurrence in the opinions delivered by the other judges), that it was substantially the case of a vendor, only adding to the price of the goods the amount of his commission. Grose, J. said, it was an action of trover by the vendee of goods against the agent of the vendor, who had stopped them *in transitu*. Fritzing bought the wax of another merchant, a complete stranger to Browne, and who had no account or correspondence with

with him, so that there was no privity between Browne and the merchant; the name of the original owner was never made known to the bankrupt, and the bills were drawn in Fritzing's own name, payable to himself; it was, therefore, the plain and common case of the consignor of goods stopping them *in transitu.* The learned judge referred to the case of Snee and Prescot[c], in confirmation of his opinion. Lawrence, J. was of the same opinion, that the plaintiffs had no right to recover. It had, he said, been contended that the right of stopping *in transitu* did not attach between these parties; that Browne must be considered as the principal for whom the goods were originally purchased; that Fritzing was no more than his factor or agent purchasing them on his account; and that the right of stopping *in transitu* did in point of law apply solely to the case of vendor and vendee. But if it were so, it would nearly put an end to the application of that law in this country: for it happens for the most part, that orders come to the merchants here from their correspondents abroad, to purchase and ship certain merchandize to them; the merchants here, upon the authority of those orders, obtain the goods from those whom they deal with, and charge a commission to their correspondents abroad upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods *in transitu.* But at any rate, the case in question was a case between vendor and vendee: for there was no privity between the original owner of the

[c] 1 Atk. 250.

the wax and the bankrupt; but the property might be considered as having been first purchased by Fritzing, and again sold to Browne at the first price, with the addition of his commission upon it. He then became the vendor as to Browne, and consequently had a right to stop the goods *in transitu*[d]. Le Blanc, J. said the questions made were, 1st. Whether the parties stood in such a relation to each other as that the right *in transitu* attached? 2dly. Whether, if they did, there existed any circumstances in the case to repel that right? As to the first, the situation of Fritzing was that of being employed by Browne to purchase goods abroad, and to send them to him here. For that purpose then of stopping the goods *in transitu*, they stood in the relative situation of vendor and vendee; though perhaps not so for all purposes. Fritzing pledged his own credit in the purchase of the goods from the original owners; and Browne could not be called upon for the value by the original owners, unless the goods came to his hands, and he had not paid or accounted for the value of them to Fritzing, with whom alone he dealt. Then clearly Fritzing had a right to stop them *in transitu*, unless the acceptance of his bills by Browne made any difference[e]. All the court, upon this latter point, held upon the authority of Hodgson and Loy[f], that it did not, it only operating as part payment for the goods.

Though goods are consigned for sale on joint account of himself and consignee.

So a person who consigns goods for sale, on the joint account of himself and the consignee, may yet be considered as the consignor or vendor of the goods, so

[d] 3 East 101, 2. [e] *Id.* 102, 3. [f] 7 T. R. 440.

so as to enable him to stop them *in transitu* to the consignee, in the event of his insolvency or bankruptcy[g]. But a mere surety for the payment of the price of the goods by the vendee, and who accepts bills drawn upon him by the consignee for that purpose, cannot himself be considered as a vendor or consignor of the goods, so as to enable him to stop them *in transitu* to the vendee[h].

If the sale of goods by an alien enemy be legalized by licence, such enemy may, like any other vendor, stop the goods *in transitu* to the vendees in this country, after their arrival in port here, and employ an agent here for that purpose. And where a licence was obtained by British merchants to proceed to an enemy's port and load a foreign cargo, that was held to legalize the sale by the enemy; and his agent appointed for the purpose having possessed himself of the goods after their arrival in port, in the event of the bankruptcy of the vendees, their assignees could not recover from him the value of the goods in an action of trover[i].

Though vendor be an alien enemy; if sale be legalized by licence.

It is certainly true, that as between consignor and factor, the latter has a lien on all consignments for his general balance, but with this restriction, that he has obtained possession of the cargo; therefore the principal may, in the event of the factor's insolvency, stop the goods *in transitu*, at any time before they actually come to his possession. The factor's being greatly

A principal may stop goods *in transitu* to his factor, though he be in advance, and has accepted bills, and paid part of the freight.

[g] Siffken *v.* Wray, 6 East 371. [h] Haille *v.* Smith, 1 B. & P. 563.
[i] Fenton *v.* Pearson, 15 East 419.

greatly in advance, and having made himself liable to pay for the goods by accepting bills, or paid part of the freight, are not circumstances from which a constructive possession can be inferred; especially if the payment be not made till after his insolvency, in which case it is fraudulent[j].

The case of Kinloch and Craig.

The case cited was an action for money had and received, on the trial of which a verdict was found for the plaintiffs. Upon a motion for a new trial, it appeared that the plaintiffs claimed as assignees of Sandiman and Graham, and the defendant was the sequestrator of one Steine, a sequestration in Scotland being analogous to a commission of bankrupt here. A cargo of spirits had been sent by Steine to Sandiman and Graham, with the invoice and bill of lading unindorsed, and bills drawn upon them, which they accepted, but which were not paid. They were under acceptances on his account for a much larger amount than this cargo. They had an annual sum in lieu of commission, besides a quarter *per cent.* beyond the £5 for money advanced. They insured the cargo in their own names. They became bankrupts the day after the ship arrived, and then told the captain they thought themselves not justified in unloading the cargo, though Steine had written to them to unload on the arrival of the ship; but they afterwards paid him six guineas on account of the freight. The captain refused to deliver the goods to their assignees. The defendant, as Steine's sequestrator, stopped the goods, and sold them. Under these circumstances the question arose, whether this action was maintainable against him for the

j Kinloch *v.* Craig, 3 T. R. 119.

the value received. Lord Kenyon having tried the cause, declined giving any opinion; and was absent. But Ashhurst, J. delivered the opinion of the rest of the court, that there should be a new trial. He observed, that there was no transfer of the property in the goods by indorsement of the bill of lading; the goods had not been paid for; the factors had only made themselves liable by their acceptances to pay for them; that it was not a case of sale, for the goods were sent to Sandiman and Graham as factors, and he did not know of any case which went the length of saying that a factor has a lien till he has obtained possession of the thing which is the object of the lien; although when he has got the possession, the goods are a pledge, and the principal shall not take it out of his hands till he pays him his due. A constructive possession could not be inferred from the part payment of the freight as factors; for being made after they had stopped payment, if with a view of taking possession of the goods, it would be a direct fraud, which the law would never suffer to vest a possession. The doctrine of liens (said the learned judge) ought to be governed by equitable principles. Here it is true that one party or the other must sustain a hardship; but where equity is equal the law must prevail. And the consignor's sequestrator has a better right to say, that it is not equitable that Steine's effects should be liable to pay the creditors of Sandiman and Graham to the full amount of their acceptances, when possibly not a fourth part may be paid, and Steine's effects must pay the rest; than Sandiman and Graham's creditors have to say, that it is hard that their effects should be diminished by paying

paying one fourth of their acceptances[k]. The rule was therefore made absolute for a new trial, and the record sent down to be tried a second time, when a special verdict was found, which is stated at length in the report[l]. But the court gave judgment for the defendant without hearing any argument, saying that the case, as it stood in the special verdict, could not be distinguished from that which had come on before; whatever difference there was, made it still stronger against the plaintiffs; for it was positively found that the bankrupts had refused to accept the cargo, and never had possession of it. A writ of error was afterwards brought in the House of Lords, when the judgment of B. R. was affirmed[m], by the unanimous advice of all the other judges. The Lord Chief Baron Eyre, in delivering the opinion of the judges, observed that the parties acted entirely upon the faith of the agreement between them, that the bankrupts should accept the bills drawn on them by Steine, and should indemnify themselves out of the produce of the sales, in case any consignment should be made them; and if none, or those sales should fall short, then by remittances; and that the bankrupts should receive an annual salary from Steine. The transaction between them with respect to the consignment was as between principal and factor, and not as between vendor and vendee; that therefore Sandiman and Graham could have no property in the cargo; and the right of stopping *in transitu* was out of the question; that never occurring but as between vendor and vendee.

For

[k] 3 T. R. 123. [l] *Id.* 784, &c. [m] *Dom. Proc.* Friday, May 14th, 1790.

For this he relied on the case of Wright and Campbell [n]. The bankrupts could have no lien in this case, as the special verdict found that the goods never got into their possession. Although the bankrupts might have given their acceptances on the faith that these consignments would be made to them, yet still it was an executory agreement, for the non-performance of which only a right of action accrued; but no property in the goods was thereby vested in them. And upon the whole, they were of opinion that the proceeds of the cargo of the ship were not money had and received to the use of the plaintiffs [o].

Factor cannot; having only a lien.

In the case Feize and Wray, Mr. Justice Grose said, if it had been the case of principal and factor merely, he should have found great difficulty in saying that the right of stopping the goods *in transitu* existed; although he was not satisfied that there was any distinction in law between the case of a vendor and a factor consigning goods [p]. However, in the latter case, it seems that the factor can only rely upon his lien so long as he retains possession of the goods; and that even delivery to a carrier appointed by the principal divests that possession, and not merely puts an end to, but utterly destroys it so as to prevent the revival of the right of lien [q]. The difference seems to be that in the case of vendor and vendee, the goods being originally the property of the vendor, he does not absolutely lose that right of property over the goods,

[n] 4 Burr. 2050. [o] 3 T. R. 786, 7; *et vide* Tooke *v.* Hollingworth, 5 T. R. 215. [p] *Per* Grose, J. 3 East 100, 101. [q] Sweet *v.* Pym, 1 East 4.

goods, in the event of the vendee's insolvency, by delivering them out of his actual possession for the purpose of being conveyed to the vendee, until the vendee himself actually obtains that possession which the vendor had, and which in such case may be prevented by a stoppage *in transitu*, the right to which remains as long as the *transitus* of the goods. But in the case of factor and his principal, the former has no original property in the goods, but only a right of lien on the actual possession of them, which is immediately lost by his parting with that possession; and ceases before the transit of the goods to their destination commences. Upon this distinction alone can the case of Sweet and Pym[r] be supported, but that case will be found to be completely authorized by and founded upon it.

Lien once parted with, cannot be revived.

There it was held that in the case of factor and principal, if the possession and consequent right of lien be once parted with, it cannot be again revived, by getting the captain of the vessel, in the course of his voyage, to sign a bill of lading to the shipper's order, for the purpose of again obtaining possession of the goods, on the arrival of them at the place of their destination. Where goods are shipped by the order and on account of the principal, to be forwarded to the latter, to whom the invoice is sent, although no bill of lading be transmitted or signed, the custody is changed by delivery to the captain of the ship, which in such case is equivalent to a delivery to the principal

[r] 1 East 4.

pal himself. The case of Sweet and Pym was an action of trover for cloth, by the assignees of a bankrupt residing in London, who had employed the defendant, residing at Exeter, in his business of a fuller; by the custom of which trade he had a lien for the general balance of his account. It appeared that the bankrupt was indebted to the defendant, upon the balance of the accounts between them, in more than the value of the goods in question, which had been sent by the bankrupt, before his bankruptcy, to the defendant to be fulled; but the defendant, after they were finished, had, in consequence of prior orders from the bankrupt, shipped the goods on board a certain vessel at Exeter, to be forwarded to him in London; and sent the invoice to him. No bill of lading was signed by the captain at the time of the shipment; but soon after the vessel sailed, the defendant, hearing of the bankruptcy, followed and overtook the captain off Deal, in his passage to London, and there procured him to sign a bill of lading to himself or order, whereby he obtained the delivery of the goods on their arrival in London. At the trial before Lord Eldon, the plaintiffs under his lordship's direction recovered a verdict; he being of opinion, that no person having a lien on goods, if he parted with the possession, could afterwards stop them *in transitu*, and thereby revive his lien against the owner. And the court of King's Bench, on a motion to enter a nonsuit, concurred in opinion with his lordship, and refused a rule[a]. In giving judgment,

[a] Sweet *v.* Pym, 1 East 4.

judgment, Lord Kenyon said, "the right of lien had never been carried further, than while the goods continue in the possession of the party claiming it; but here, the goods were shipped by the order and on account of the bankrupt, and he was to pay the expence of the carriage of them to London: the custody therefore was changed by the delivery to the captain." In the case of Kinloch and Craig[t], where he had the misfortune to differ with his brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession; but the contrary was ruled by the court of King's Bench, and afterwards in the House of Lords[u]: though there, the factor had accepted bills on the faith of the consignments, and paid part of the freight, after the goods arrived[v]. Grose, J. considered the delivery of the goods by Pym to the captain, as equivalent to a delivery to the bankrupt[w].

Quære, Whether consignee may take possession of the goods *in transitu*?

It is a very important question, (but which does not appear to have been solemnly decided, though raised in the case of Oppenheim and Russell), how far the consignee, or any person claiming under him, can, by stopping the goods before they arrive, defeat the claim of the consignor to stop them *in transitu*, or how far an attempt to reduce them into actual possession by the consignee, before the claim of the consignor, will defeat that claim. In the course of the argument, a case was put (which Lord Alvanley did not think quite clear), that if the sheriff seize the goods *in transitu* under a *fieri facias*, in satisfaction of a debt due from

[t] 8 T. R. 119. [u] *Id.* 786. [v] 1 East 5. [w] *Id.* 6.

from the consignee to a third person, the consignor's claim to resume the property could not afterwards avail him. His lordship afterwards said, that it appeared to him very doubtful, whether the sheriff could make them absolutely the goods of the consignee, by stopping them before they came to his hands; and in the case then before the court, neither the consignee, nor any person claiming under him, had attempted to reduce the goods into actual possession, before the consignor's claim [x]. Mr. Justice Chambre, (speaking of the comparisons which had been made between the case of a carrier, and that of a creditor of the consignee taking goods in execution upon their passage), said, perhaps the consignee himself might intercept the goods in their passage; and indeed he had little doubt but that if he did so, and took an actual delivery from the carrier before the goods got to the end of their journey, and before the consignor had exercised his right of stopping them *in transitu*, such a delivery to him would be complete: and he would not say but that the consignee's creditors, in the case of an execution against his goods, might not do the same thing. No authorities, however, were cited to prove that they might; but supposing that to be so, still he did not think it applied to that case, for the creditor under an execution takes the goods absolutely, to dispose of them as the consignee himself would have done; but the carrier has no absolute right in the property, but only a lien [y]. With respect to

[x] 3 B. & P. 48. [y] *Id.* 54, 5.

the general question, in Mills and Ball[z], Lord Alvanley said, if in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them. And although it has been said that the right of stoppage continues until the goods have arrived at their journey's end, yet if the vendee meet them upon the road, and take them into his own possession, they will then have arrived at their journey's end, with reference to the right of stoppage. In that case, it was almost admitted in the argument, that if the plaintiffs could have got the goods into their possession, they would have had a right to keep them; but, as his lordship observed, no demand was made on the part of the original consignees[a]. Rooke, J. also remarked, that the consignees did nothing to take possession of the goods while they remained with the wharfinger, before the plaintiffs made their claim[b]. And Chambre, J. said, no act was done to shorten the journey[c].

Qu. if goods, sent to Y., be there received by vendee's agent, instead of being forwarded to vendee at N. as usual, can afterwards be taken as *in transitu?*

In the case of Wright and Lawes[d], (wherein so many important points on this subject were ruled by Lord Kenyon), it was contended, that as the plaintiff the consignee of the goods lived at Norwich, and the usual course was to put the goods into lighters at Yarmouth, (at which latter place they had arrived, and were deposited in cellars by the plaintiff's agent), to be forwarded to Norwich; until their arrival at the latter

[z] 2 B. & P. 461. [a] *Id.* 462. [b] *Id.* 463. [c] *Id.* [d] 4 Esp. Rep. 84.

latter place they were *in transitu*, and could be stopped by the owners; who had, in order to stop them, given an indemnity to the cellar-keeper, who had possession of them at Yarmouth. But to this it was answered, that the goods, being sent by sea, if the consignee was ready to receive them when discharged from the ship, that was a delivery, at whatever period of their course of delivery they were so received; and he was not bound to receive them at his own door, but might have them delivered at any place which best suited his convenience. Lord Kenyon's attention seems to have been attracted by this latter observation; as he does not appear to have taken notice of the point principally relied on by the defendant's counsel, that the vendee or his agent could not, by receiving and taking possession of the goods before they had arrived at the place of their ultimate destination, lessen the transit of the goods, or deprive the owners of their right of stoppage *in transitu*. Nor does the noble and learned judge appear to have given any opinion, or made any observation on the circumstance adverted to by the plaintiff's counsel in his argument upon the point, viz. that the goods were sent by sea carriage. Indeed, the general question could not arise in that case, as the goods had been discharged from the ship, which had brought them as far as goods were usually brought until they were put into lighters; and they were received by the plaintiff's agent. The master therefore had (as his lordship observed) made a complete delivery according to the bill of lading. But the case, as far it goes, is certainly an authority to shew, that where goods are to be car-

 ried

tied to one place on ship board, and then forwarded on to the consignee at another, by a different mode of conveyance, it is competent to him, by himself or his agent, by receiving and taking possession of the goods when discharged from the ship, before they are forwarded to their ultimate destination, to prevent the subsequent stoppage of the goods by the vendor, in their *transitus* to that destination. However, a mere *nisi prius* opinion, and that perhaps rather loosely reported, upon so important a point, though given by one of the greatest judges of modern times, and entitled to the greatest respect, cannot be considered as quite concluding the question.

Where vendee claims under one who has defrauded the real owner, of the goods, he must shew the sale to him fair.

However this point may be, if the goods be improperly obtained from the owners, as having been purchased by a mere swindler or man of straw, and who is the correspondent of, or otherwise connected in the transaction with the person of whom the plaintiff bought the goods, it is incumbent on him, in an action against the original owners of the goods, or a defendant who holds possession of them on their indemnity, under a claim to stop them as *in transitu*, to shew that he (the plaintiff) has fairly purchased them, by giving clear evidence of the agreement with his immediate vendor for the purchase of them; for otherwise it may be presumed he was concerned in the fraud. Therefore, in the case of Wright and Lawes, where the plaintiff agreed with one Shevill for the purchase of the wines, which were bought by Shevill's correspondent (one Farquharson) of Bamford, Bruin, and Co.; and they, on discovering Farquharson, to whom they had sold them, to be a swindler and man of no property,

property, stopped the wines, in the possession of a person in whose cellars they had been placed by the plaintiff's agent on his account; and the plaintiff brought trover against the cellar-keeper; it being objected by the defendant's counsel that the plaintiff was concerned in the purchase of the wines by collusion with Shevill and Farquharson, which being fraudulent, could pass no property; Lord Kenyon ruled, that as the wines had been improperly obtained from Bamford, Bruin, and Co., it was incumbent on the plaintiff, by clear evidence, to shew that he had fairly purchased them of Shevill. The plaintiff proved this. It then appeared that he had paid for one of the four pipes; whereupon it was contended by the defendant's counsel, that this entitled the plaintiff to that pipe only for which he had paid. But Lord Kenyon said, that it being an entire agreement for the four pipes, on proving that agreement and payment of the consideration for one pipe, he thought it gave the plaintiff a title to the whole*.

Ruled, that consignee cannot take possession of goods, on vessel's coming out of port, or while she is at sea, or in quarantine.

But it has been ruled, that in the case of a consignment by sea, in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by him on the completion of the voyage, and that the consignee has not a right to go out to sea to meet the ship; which would go the length of shewing that if the consignee met the vessel coming out of the port from which she has been consigned, that circumstance should divest the property out of the consignor and vest it in himself, which was a position not to be supported;

* Wright v. Lawes, 4 Esp. 83, 4.

ported; as there would then be no possibility of any stoppage *in transitu* at all. And where a vessel at the end of her voyage is ordered to perform quarantine, the voyage is not completed till she has performed it, till which time she is *in transitu;* and if the plaintiff's agent give notice and claim the cargo, before the completion of the voyage, *i. e.* whilst she is performing quarantine, that is a sufficient stoppage of the goods to prevent the property vesting in the assignees of the consignee, if he become bankrupt; though one of the assignees goes previously on board the ship, and claims the cargo as belonging to the bankrupt's estate, opens the chests, and puts persons on board to keep possession, who continue on board till the quarantine is ended[f]. In the case cited, the plaintiff was a merchant at Leghorn, and the defendants the assignees of Dutton and Company of Liverpool; who, in September, 1792, had given the plaintiff an order to charter for their account a vessel for Liverpool, with a cargo of fruit. This they accordingly did; and the captain signed bills of lading as usual, one of which was sent to Dutton and Co. In March, 1793, before the arrival of the vessel at Liverpool, Dutton and Co. stopped payment, and were declared bankrupts; wherefore the plaintiff, having learnt that circumstance, sent one of the bills of lading to Staples and Co. of London, who authorized a Mr. Ellames, of Liverpool, as the plaintiff's agent, to stop the cargo. On the 9th of June, the vessel arrived at Liverpool; but was ordered to perform quarantine. On

[f] Holst *v.* Pownal, 1 Esp. Rep. 240.

On that day, one of the defendants, as assignee of the bankrupts' estate, went on board the ship and claimed the cargo, opened some of the chests, and put two persons on board, who continued alternately there till the 18th, when the quarantine was ended. On the 17th, while the vessel was performing quarantine, Ellames, as agent for the plaintiff, served a notice of Dutton and Co.'s bankruptcy on the captain of the vessel, and claimed the goods on the plaintiff's behalf, and offered an indemnity. Similar notice was served on the defendants. On the 18th of June, the vessel came into harbour, and on the 19th she broke bulk; when Ellames repeated his claim, and offer of indemnity. But the captain delivered the cargo to the assignees, against whom an action of trover was brought for the value of it. And Lord Kenyon was of opinion that this was a sufficient stoppage *in transitu* to maintain the action, and the plaintiff obtained a verdict; though, upon the application of the defendant's counsel, his lordship saved the point. A new trial was moved for, on the matter of law as ruled by Lord Kenyon; but the court of King's Bench concurred in opinion with his lordship, and refused a rule to shew cause [s].

In a note in Bosanquet and Puller's report of the case of Mills and Ball, they cite the above *nisi prius* case as apparently in opposition to the opinion of Lord Alvanley then delivered, and make a *quære*, whether there be any distinction between carriage by sea and carriage by land upon this point; for (as they say) it may be observed, that in the former case,

Semb. No distinction between land and sea carriage, as to stoppage by consignee, before actual delivery; and that such right does not exist.

[s] Holst *v.* Pownal, 1 Esp. Rep. 243.

case, the master, by signing the bill of lading, agrees with the consignor to deliver the goods *at* the destined port, whereas in the latter, no such *express* agreement is entered into between the vendor and the carrier[h]. But however that may be, it is clear that Lord Kenyon's opinion in Holst and Pownal does not appear to have proceeded on any such distinction, any more than that of Lord Alvanley in the case of Mills and Ball; though, if the distinction be a good one, it would overturn both opinions, rather than confirm either of them. If it proved any thing, it would be, that in the case of sea carriage, as the master, by his bill of lading, engages for delivery *to the order or assigns of the shipper*, at the port of discharge, and not merely at that port, the consignor could not, in any case, stop the goods *in transitu*, so as to prevent such delivery, and make the master incur a breach of contract. Supposing (according to the doctrine of Lee, C. J. in Fearon and Bowers, 1 H. B. 364.) that the captain is justified in delivering the goods to the holder of either of the bills of lading, it is clear that the person entitled to the goods, standing in the place of the shipper, may, if he please, take them from the captain before the voyage is performed; and the dispensation with the performance of it will discharge the captain from any damage for the non-performance of the contract, whether it be express, as in the one case, or implied, as in the other. Therefore, with every respect for the gentlemen who have suggested the above distinction, in the author's humble judgment, it cannot be supported; and the same rule must be adopted, as to

[h] 2 B. & P. 461.

to the consignor's right to take possession of the goods before delivery, in the case of a consignment by land and by sea carriage. If he were to venture an opinion upon that very important, but seemingly undecided question, it would be, in conformity to Lord Kenyon's doctrine in Holst and Pownal, that the consignee could not take possession, in contravention, or possibly in destruction of the vendor's right of stoppage *in transitu*: and for this very reason, that independently of that right, the consignor may (though perhaps the consignee may also) *as between himself and the carrier*, dispense with the performance of the contract for the conveyance of the goods, whether by land or by water; and *as between the consignor and consignee*, the first, and only principle, of the doctrine of stoppage *in transitu* is, that the former should not be prejudiced by the insolvency or bankruptcy of the latter, or any thing short of an actual delivery in pursuance of the contract between them. It is conceived that the carrier's liability on his contract is quite collateral, and immaterial to the vendor's right of stoppage *in transitu*, which is anterior and paramount to all others[1].

[1] See 3 B. & P. 42. 119.

CHAPTER

CHAPTER II.

HOW, AND WHERE, THE RIGHT OF STOPPAGE IN TRANSITU MAY BE EXERCISED.

Contents of chapter.

IN this chapter, it is intended to shew, first, how and where the right may, in general, be enforced; and secondly, where it may be exercised as against an assignee of the bill of lading. In considering what is a sufficient exercise of the right, it will appear that a resuming of possession, by any means not criminal, is justifiable. It will be shewn where, by the interference of a foreign court, the captain can be compelled to sign new bills of lading to the order of the shippers, or the cargo can be detained till payment; how far a claim and endeavour to regain possession of the goods will amount to a stoppage *in transitu;* whether bankruptcy, of itself, be a countermand of the delivery; and if a mere countermand be of itself sufficient. In considering where the right of stoppage may, in general, be exercised, the cases will be stated in which it has been decided whether the right may be put into force though bills have been given for the price of the goods; or they have been paid for, wholly or in part;

part; and where a previous tender is necessary to be made of the freight, &c. or for the land carriage, or wharfage of them; or of an antecedent debt due from the vendor of the goods, or of advances made in expectation of their arrival.

Resuming possession by any means not criminal.

As to the manner in which the right of stoppage *in transitu* may be exercised, it appears that the possession of the goods may be resumed by the vendor or consignor, by any means not in themselves criminal, or amounting to a breach of the peace[a]. When once the privilege of stopping the goods is ascertained to be a legal right (as it has been fully proved to be[b]), it follows that all lawful means may be taken to enforce it; nor can any action of trover, trespass, or other remedy, be maintained against a person, for exercising that right of possession and dominion over property, which is given by law; especially when it is considered that the property was originally his own, and in the event which has happened, he is invested with a legal right of preventing it from becoming the property of another; as he is by stoppage *in transitu*, which divests that inchoate and imperfect right of property, in the vendee or consignee, that takes place on the delivery of the goods for the purpose of their conveyance to him.

Proceeding to make captain sign new bills of lading to consignor, &c.

Lord Loughborough, in giving the judgment of the Exchequer Chamber, in the famous case of Lickbarrow and Mason, states the following instance of the interference of a foreign court, in the event of the consignee's

[a] 2 T. R. 679. [b] *Ante*, 400, &c.

consignee's insolvency, by ordering the ship-master, who had before signed bills of lading to the consignee or order, to sign other bills of lading to the order of the shipper of the goods. Bowering had bought a cask of indigo of Verrulez and Co. at Amsterdam, which was sent from the warehouse of the seller, and shipped on board a vessel commanded by one Tulloh, by the appointment of Bowering. The bills of lading were made out and signed by Tulloh, for delivery to Bowering or order; who immediately indorsed one of them to his correspondent in London, and sent it by the post. Verrulez, having information of Bowering's insolvency, before the ship sailed from the Texel, summoned Tulloh, the ship-master, before the court at Amsterdam, who ordered him to sign other bills of lading, to the order of himself, Verrulez. This case, as to the practice of merchants, deserves particular attention; for the judges of the court at Amsterdam are merchants of the most extensive dealings, and they are assisted by very eminent lawyers[c]. One of the mercantile navigation laws of Russia expressly authorizes a stoppage of goods loaded on board ship, in case of the vendee's insolvency. It orders, that "in case of debts unpaid, or bankruptcies, if any body has reason to suspect that the debtor or bankrupt has any thoughts of making the creditor lose, and therefore loadeth goods on board of ship, the creditor is to give notice to the head judge of the court that the ship or cargo may be retained, until full payment is made[d]." A commentary upon this law states, that in such case, the goods must be given back to the sellers or shippers,

[c] 1 H. B. 364. [d] 25th June, 1781, § 138.

pers, being their property, and cannot be brought in concurs; which seems to mean that they cannot be brought into the general fund of the bankrupt or insolvent. In the case of Inglis and Underwood[e], where the effect of this law came in question, Lord Kenyon remarked that it was a very equitable law, and that he had frequently lamented that our own code was defective in this particular. For every man contracting to supply another with goods, acts on the presumption that that other is in a condition to pay for them; and therefore, when the condition of the consignee is altered at the time of the delivery, he being then insolvent, and no longer capable to perform his part of the contract, honesty and good faith require that the contract should be rescinded. However the contrary has been settled to be law, unless the consignor stop the goods *in transitu*, before they get into the consignee's possession[f].

Claim and endeavour to get possession is sufficient to stop the goods.

The courts have, of late years, for the furtherance of justice, leaned much in favor of the power of the consignor to stop his goods *in transitu*. Lord Hardwicke had been of opinion, that in order to stop the goods, there must be an actual possession of them obtained by the consignor, before they came to the hands of the consignee; but that rule was relaxed, it having since been held that an actual possession is not necessary, and a claim is sufficient; to which opinion Lord Kenyon subscribed. And it is clear that a claim by the agent of the consignor's is the same, in point of law, as the personal act and claim of the consignor himself.

[e] 1 East 515. [f] *Id.* 524.

himself. If therefore the consignor, or his agent, claim and use every endeavour to get possession of the goods, that is a sufficient stopping *in transitu* to secure the rights of the consignor [g]. The case cited was that of an action by the assignees of the vendee, a bankrupt, against the broker, who had received the produce of some wines sold at the king's stores by public sale; and the agent of the consignors having, before the duties were paid, applied for and endeavoured to get possession of them before the sale, it was held by Lord Kenyon that it was a sufficient stoppage *in transitu*, and consequently the plaintiffs were not entitled to recover; inasmuch as the bankrupt, or his assignees, could have no title to the possession till the duties were paid, until which time the goods remained *quasi in custodiâ legis* [h]. In the case of Mills and Ball, the judges considered a claim or demand of the goods as equivalent to taking actual possession of them, for the purpose of stoppage *in transitu*. Heath, J. observed, that there was certainly no corporal touch, but that took place which was equivalent to it; the plaintiffs gave *notice* to the wharfinger, and *demanded* the goods as their property [i]. Chambre, J. said, that when the vendor, having *notice* of the insolvency, made a *demand* upon the person in whose custody the goods were, he thereby defeated the contract; for if this were not the case, the carrier would have it in his power to decide between the vendor and the assigns of the bankrupt [j]. And in the case of Oppenheim and Russell, Lord Alvanley uses an expression, which at the same

[g] *Per* Lord Kenyon, Northey *v.* Field, 1 Esp. Rep. 614. [h] *Id.*
[i] 2 B. & P. 462. [j] *Id.* 464.

same time authorizes the opinion that a claim of the goods is a sufficient exercise of the right of stoppage *in transitu*, and affords a clear and general principle, for determining the period until which such right may be exercised. The expression of his lordship is, that the consignor may stop the goods "if he *claim* to resume them, before they come into that situation which gives the consignee a complete dominion over them[k]." Again, in the subsequent case of Bohtlinck and Inglis, Lawrence, J. in delivering the opinion of the court, said, that if the goods were *demanded*, by any one authorized by the consignors to receive them, from the persons in whose possession they were, that was tantamount to their being stopped *in transitu*; for it can never be permitted to a carrier, by not delivering the goods, to vary the property, and decide to whom they shall belong[l]. And, as it was observed in a previous page[m], in the subsequent case of Dixon and Baldwin Lord Ellenborough, C. J. observed, that in the case of Bohtlinck and Inglis, the consignors maintained trover against the assignees of the consignee, upon a mere *demand* and refusal of the goods by the captain, before they were delivered[n].

Bankruptcy, not of itself a countermand.

With respect to what shall be considered a sufficient countermand, to enforce the right of stoppage *in transitu*, it has never yet been decided that bankruptcy is of itself a countermand. On the contrary it is clear, that does not of itself put an end to the contract[o], and has always been considered only as a ground for stopping

[k] 3 B. & P. 47, 8. [l] 3 East 394. [m] *Ante*, 404. [n] 5 East 186.
[o] *Per* Lord Kenyon, Ellis *v.* Hunt, 3 T. R. 467.

ping the goods by other means. That it is not of itself sufficient to save the vendor's right of stoppage *in transitu*, appears to have been ruled by Lord Kenyon, at *nisi prius*, long after the case of Ellis and Hunt, in a case of Bohtlinck and Sneider; where, it having been previously decided by his lordship that there was a delivery to the consignee, one of the jury asked, if it made any difference that he had previously committed an act of bankruptcy; to which Lord Kenyon answered that it made none[p]. Indeed, it seems that a countermand, to enforce the right of stoppage *in transitu*, must be actual and express, and not merely constructive or implied; there should at least be a claim of the goods, and an endeavour to get possession of them, on the part of the consignor or vendor, and to prevent them from getting into the possession of the consignee. In the subsequent case of Bohtlinck and Inglis[q], the goods in question were not delivered on board the ship, which was to bring them from Russia to the consignee in London, until after the consignee had committed an act of bankruptcy. In another, and still more modern case[r], it appears that Lord Alvanley, C. J. at the trial, had expressed a wish that the question, how far the bankruptcy of the vendee operated as a countermand of his previous orders for the goods should be considered by the court; but that point was abandoned in the argument of the rule for a new trial. Lord Alvanley afterwards said, that on looking into the cases, he found that question to be completely closed in Westminster Hall; and the court was therefore bound

to

[p] *Per* Buller, J. Bohtlinck *v.* Sneider, 3 Esp. 59. [q] Bohtlinck *v.* Inglis, 3 East 381. [r] Scott *v.* Pettit, 3 B. & P. 471.

to hold, that although a bankrupt has altogether ceased to be a trader, yet that his warehouse continues open for the purpose of receiving goods; and that the assignees have a right to take possession of every thing that may come into their hands without paying a single farthing, even though the consignors of the goods are not entitled to come in under the commission. No doubt therefore, for the purpose of receiving goods, the assignees stand in the place of the bankrupt[s]. It is to be lamented that goods consigned to a bankrupt, which arrive after his bankruptcy, should ever be considered as part of his effects. The hardship to which this rule of law has given rise in particular cases, was the occasion of introducing the doctrine of stoppage *in transitu*[t]. But the cases are too decisive upon the subject, for the courts now to adopt a contrary doctrine. And in the case of a trader having no warehouse of his own, and whose goods are consigned to the warehouse of his packer, it would be a hardship on the creditors, if they were not permitted to resort to the property in the hands of the packer, since the trader could have no stock in his own possession; for the creditors of a trader are supposed to look to whether he has goods in his possession, and trust him accordingly. In the case put, they have no such opportunity; although, knowing that he considered the warehouse of the packer as his own, and that the goods were consigned to him there, they might have trusted him on the credit of the goods[u].

No

[s] Scott *v.* Pettit, 3 B. & P. 471. [t] *Id.* 472. [u] *Id.* 473.

Qu. If a mere countermand be sufficient?

No case has yet expressly determined, that a mere countermand of the delivery is a sufficient exercise of the right of stoppage *in transitu*. In prudence, the party exercising that right will do every thing in his power, peaceably to regain the actual possession of the goods. Where he does that, clearly it is all that can be required of him. It cannot be necessary, or justifiable, to proceed to acts of violence for the purpose. And though a countermand of the delivery is not to be intended or presumed, from the bankruptcy of the vendee or consignee; yet it seems that an express countermand, clearly indicating the original owner's intention to resume the possession of the goods, would of itself be sufficient, for the reason before hinted at; namely, that it cannot be in the power of a carrier, or any other middle-man, after such express intimation of the original owner of the goods, to deliver them to other persons who are destitute of any thing like an equitable title.

Right of stoppage may be exercised, though bills, &c. given.

A distinction has been taken, between cases where a note is given at the time of the contract, in payment for goods sold, and where it is given in payment of a preceding debt; and in the former, it is said to be a purchasing of the note[v]. But this distinction seems no longer regarded in cases of this nature; the rule now being, that if the defendant has agreed to take the notes as payment, and run the risk of their being paid,

[v] Clerk *v.* Mundall, 12 Mod. 203. Salk. 124. S. C. Anon. 12 Mod. 517. Bul. N. P. 277. Ward *v.* Evans, 2 Ld. Raym. 930.

paid, that will be considered as payment, whether the notes are or are not afterwards honored; but without such agreement, the giving of such notes is no payment. In the latter case, if the bill or note turns out unproductive, the party may consider it as a nullity, and act as if none had been given; especially, if it be drawn on a person with whom the party giving it has no connexion; in which case it is a plain fraud[w]. But without that circumstance, if notes or bills be given as payment, without being expressly accepted as such, and due diligence be used to obtain the money without effect, the expected payment of the price totally fails. It is impossible to say that the goods are paid for, where the contract is for ready money; and it would be most unjust that the vendee should take the goods without paying for them. The understanding of the parties in such case is, not that the notes, &c. are taken absolutely as payment of the ready money price, but that they shall be so considered if paid when presented. If dishonored, the condition fails, and there is no payment[x]. The owner therefore may countermand or stop the goods before delivery.

But if the price of the goods be not merely secured, but paid to the vendor or consignor, he cannot afterwards stop them in their transit or passage to the vendee or consignee. It may be a question indeed, whether, if goods be stopped *in transitu* before payment, and thereupon the price is offered to be paid, the

Aliter if price be paid.

[w] Puckford *v.* Maxwell, 6 T. R. 52. [x] Owenson *v.* Morse, 7 T. R. 64.

the payment must not be accepted, and the goods delivered according to the original contract of sale. No case of this sort has yet occurred. But it seems, that if immediately upon the stoppage, payment be offered, it cannot be refused; though there can be no doubt, but that if the goods are taken back by the vendor, he will not be bound to keep them on his hands for an unlimited length of time, when it is no longer probable, from the insolvency of the vendee, that he will be able to pay the price. The contract of sale, it is true, is not rescinded by the stoppage of the goods; but the vendor cannot be sued for a non-delivery of them according to the contract, when the vendee is no longer able to pay for them[y]. These observations are, of course, made without reference to any special contract between the parties, to postpone the payment.

Where a tender is necessary.

If the party detaining the goods was a wrong-doer in taking them, or claims a general property in them against the plaintiff, it is a needless and would be a nugatory thing, to tender him any expences he has thought proper to incur respecting the goods[z]. But if the party got possession of the goods lawfully, and claims a lien upon them for the freight due to him for their carriage, or expences necessarily incurred by him, under the express or implied authority of the owner, such freight or expences must be formally tendered, before an action of trover is commenced against such person; for as long as that lien is unsatisfied by the default

[y] See Morton *v.* Lamb, 7 T. R. 125. Rawson *v.* Johnson, 1 East 203. [z] Lempriere *v.* Pasley, 2 T. R. 486. 490. Walley *v.* Montgomery, 3 East 592, *per* Grose, J.

default of the owner of the goods, it cannot be said that there is any injurious conversion of them by the defendant.

Tender of land carriage.

It is evident that there is a certain privity of contract between the consignor and the carrier, from this consideration, that if the consignee run away and cannot be found, or will not take the goods, but denies having ordered them, or relies upon a countermand, in either of these cases the carrier may come upon the consignor for the carriage of the goods; which he could not do, unless there was a privity of contract between them [a]. It is beyond all question, that the carrier has a lien as against the consignor [b], as well as the consignee [c], for the labour bestowed in the carriage of the particular goods; but it is extremely doubtful, whether he has against either of them a lien for his general balance [d], unless by special agreement. And the courts will not favour the presumption of an agreement from usage [e], or a right of lien for a general balance due from the consignee, where the carriage is payable by the consignor [f], especially as against the consignor's right of stoppage *in transitu* [g]. In the case of Oppenheim and Russell, the carriage for the particular goods in question was tendered with an indemnity, and refused; which was all that the consignor could, in any view of the case, be obliged to offer. Indeed an indemnity could not have been legally required,

[a] *Per* Heath, J. 3 B. & P. 49. [b] *Id.* 51, *per* Rooke, J. [c] *Id.* 53, *per* Chambre, J. [d] *Id. per tot. cur.* [e] 6 East 519. 7 East 224. [f] 2 N. R. 64. [g] Oppenheim *v.* Russell, 3 B. & P. 42.

quired, though it was but fair and reasonable to offer one. All that can, in strictness, be demanded by the carrier, in general cases of stoppage *in transitu*, is payment, or tender of the price of carriage for the particular goods, without any indemnity; though in many cases it is fair and prudent to give one[h]. When the carriage is payable by the consignor, no usage, or exercise of a lien for a general balance, will authorize the carrier to detain the goods from the consignee, after he has paid for the carriage of them[i].

Tender of wharfage.

It seems to be clearly settled by the case of Richardson and Goss[j], that although a wharfinger has a particular lien against the vendor or vendee of goods for the charges on them, and also a general lien for his balance against the owner, whoever that may be, whether vendor or vendee; yet he can only exercise that lien against him, and cannot set it up for a general balance due from another person; so that if the vendor be the owner by stoppage *in transitu*, or rescinding the contract, he is not subject to pay a general balance due from the vendee.

Of antecedent debt from vendor to vendee.

If the consignee or vendee never actually receive the goods, the vendor cannot, on any principle of law, be obliged to tender an antecedent debt due from him to the vendee, any more than the money immediately advanced on the goods, if it be no part of the contract of purchase; for the vendee cannot acquire any general lien on goods, before he receives them[k].

In

[h] See Wright *v.* Lawes, 3 Esp. 85. [i] Butler *v.* Woolcott, 2 N. R. 64. [j] 3 B. & P. 119. [k] Hodgson *v.* Loy, 7 T. R. 441, *arguendo*.

In the case of Richardson and Goss[l], Lord Alvanley said, that if the defendant had been induced to advance money, or accept bills, on the expectation of the arrival of the goods, he might have acquired a lien upon them to the amount of the credit given on those specific goods, the party to whom such credit was given having had a right to direct the goods to his wharf at the time when it was given[m]; as an authority for which, he referred to the case of Hammonds and Barclay[n]. Afterwards, his lordship said, "I admit that if Wilson had received money from the defendant, or the latter had accepted bills upon the faith of these goods, the defendant would have had a right to retain; because the plaintiff had invested Wilson with a power to make them liable to such claim." But Chambre, J. after observing that it had been argued that the wharfinger might have extended his credit to Wilson upon the assurance of the arrival of the goods, said, that was a speculation which the law did not allow, for there can be no lien till possession[o].

Of advances before the arrival of the goods.

Having, in the previous part of this chapter, considered how, and where, the right of stoppage *in transitu* may be enforced, in common cases; it remains to consider, first, where it may be exercised as against a *bonâ fide* indorsee of the bill of lading, in general; and, secondly, where the assignee's right will or will not prevail

Contents of remaining part of this chapter.

[l] 3 B & P 123. [m] *Id.* 123. [n] 2 East 227. [o] 3 B. & P. 128.

prevail against it, in particular cases. In discussing the former of these questions, it will be necessary to state, at some length, the two cases of Snee and Prescott, and Lickbarrow and Mason, which established the whole doctrine on this subject. The facts and the judgments in those cases are numerous and intricate. An imperfect or superficial statement of them would have been of no use. They are therefore fully and accurately detailed. Under the second head of enquiry, it will be found that the right of the assignee of the bill of lading has been held to prevail against that of the original owner of the goods, to stop them *in transitu*, though the assignee have notice that they are not paid for; or the risk of the consignment remain in the consignors; or the warehouse-room be payable by the vendors; or the price be only paid in part, or acceptances be given for it, and proved under a commission of bankrupt. But the assignee's claim will not prevail if the bill of lading be transmitted merely, and not indorsed; or the indorsement be fraudulent, or such as ought not in fairness to have been taken; or it be made as a security for acceptances of less amount than the value of the goods; or be taken by one partner with notice of non-payment by the other; or from a merchant, with notice of a previous sale by his factors; or upon a condition, not performed. These considerations will form the subject of the remaining part of this chapter.

The case of Snee and Prescott.

The first question as to the right of stoppage *in transitu* between the consignor and the assignees of the consignee, was agitated in a court of equity, in the case

case of Snee and Prescott[p]; which was principally relied upon by the defendants in Lickbarrow and Mason, and which has been so often since quoted in courts of law. It will therefore be right to state the particulars of it, though its authority has been considerably shaken, if not completely over-turned, as applicable to any other than the original parties to the consignment, by the subsequent case of Lickbarrow and Mason, in the King's Bench and House of Lords[q]. The case was this: Snee and another, plaintiffs in the suit, were the assignees of one Tollet, a bankrupt; and the bill was brought by them against Prescott, a partner in the house of Ragueneau and Co. the consignors (as they may be called) of the goods in question; Dawson, the captain of the ship by which the goods were consigned; Julian and Le Blon, to whom the bankrupt had assigned the bills of lading of part of the goods, as a security for money borrowed of them by the bankrupt; two other persons of the name of Thomas, to whom the bankrupt had made over invoices of other parts of the goods, for other sums in which he was indebted to them; and lastly, the bankrupt. The short state of the facts (which are very badly, and it seems inaccurately[r] reported) is, that Tollet having consigned to Ragueneau and Co. at Leghorn, wools to a large amount, gave orders to barter them for Italian goods. Ragueneau and Co. accordingly advanced considerable sums in the purchase of silks, which they consigned to Tollet, and shipped at his risk and on his account, making him debtor for the amount; and indorsed

p 1 Atk. 245; and see 1 T. R. 73, *per* Buller, J. 76, *per* Grose, J.
q 1 T. R. 63. 76. 5 T. R. 367. r See 2 T. R. 73, *per* Buller, J.

dorsed and sent the bills of lading to him, which he assigned to the defendants, Julian and Le Blon, for the money advanced by them to him. Tollet became bankrupt; and Prescott, partner of Ragueneau in London, hearing of this, wrote to his partners at Leghorn, desiring them to send him the bills of lading left with them; which they accordingly did, with orders for Dawson, the captain, to deliver the goods to Prescott. The Lord Chancellor, after observing on the hardship of the case as against Ragueneau and Co. said, that "if Tollet, the bankrupt, had gained any legal property in the silks, it was gone by his assignment to Julian and Le Blon; without which circumstance the bill ought to have been dismissed with costs. With respect to the silks of which no bill of lading had been sent, there was no pretence for saying that the bankrupt had any property in them; a promise to send a bill of lading, if it amounted to any thing, was only ground for a bill in equity for specific performance, to have it carried into execution. As to the other silks, whilst they remained in Ragueneau's hands, they clearly had a lien on them to the amount of their advances, without paying which Tollet could never have compelled the delivery; for the maxim, 'he who would have equity must do equity,' would have applied. Then with respect to the indorsement of the bills of lading, as it was in blank, to the order of the consignors, it was rather in the nature of an authority than any thing more; and the evidence on the part of the defendants, as to the custom of merchants (which greatly preponderated against the plaintiff's evidence), was, that indorsements in blank were made to reserve a power of varying the consignment, where there was any doubt

doubt about the solvency of the consignee. And although it had been argued that in case of any loss or accident to the goods, it would have been at Tollet's risk only; yet if there had been any alteration of the consignment, whilst the goods were *in transitu*, the loss clearly must have been borne by the consignors. Upon the equity of the statute of set-off, 5 *Geo.* 2. if there had been no assignment by Tollet, and his assignees had brought trover for the goods, the money advanced on them would have been deducted from the damages; *à fortiori* that ought to be done in equity. If the defendant Prescott had got the goods back again by any means, provided he did not steal them, he would not have been to blame; and to take them from him would be extremely inequitable. The goods were not actually delivered." Upon the whole of the circumstances, the justice of the case, and the evidence of the custom of merchants, his lordship decreed a sale and account, and that the claim of Prescott, and his partner (Ragueneau), should be first satisfied.

Remarks on that case.

It has been judiciously remarked, that unless Lord Hardwicke had been of opinion that the indorsement by the consignee did not absolutely transfer the property in the goods, he would have decreed that the indorsees should have been first paid the money which they had advanced upon the credit of the bill of lading, and that the surplus should have been paid to the consignors; but instead of that, he gave a priority to the consignors[a]. But as it was observed in a previous

[a] 2 T. R. 65, 6, *arguendo*.

ous page[t], it is very clear that the decision was greatly influenced by the evidence on the custom, as to the supposed difference between a full indorsement of a bill of lading, and an indorsement in blank; which is now utterly exploded. In the case of Lickbarrow and Mason, the judges differed as to whether Lord Hardwicke's judgment proceeded on legal or equitable principles[u]. Mr. Justice Buller says, the only point of law was upon the form of the bills of lading; the decision was founded upon equitable principles, and upon its own particular circumstances, so as not to decide any other case not precisely similar, and much less to constitute an authority on which to decide the general question at law[v]. However Lord Loughborough, in giving the judgment of the Exchequer Chamber in error, in Lickbarrow and Mason, speaking of the case of Snee and Prescott, says, that case, though in a court of equity, was professedly determined on legal grounds by Lord Hardwicke, who was well versed in the principles of law; and it is an authority, not only in support of the right of the unpaid owner to retain against the consignee, but against those claiming under the consignee, by assignment for valuable consideration and without notice[w]. But in subsequent cases, that of Snee and Prescott seems to have been considered as only establishing the general doctrine of stoppage *in transitu*, between the original parties to the consignment; and in that point of view, not to have been in the least shaken by the case of Lickbarrow and Mason. In Salomons and Nissen, Lord Kenyon states Lord Hardwicke's

[t] *Ante*, 324, 5. [u] *Vide ante*, 400, &c. [v] 2 T. R. 73, 75, *per* Buller, J. [w] 1 H. B. 364.

wicke's opinion in Snee and Prescott to have only amounted to this, that where a merchant has sold goods, which have not been delivered or paid for, he may, whilst they are *in transitu*, obtain the possession of them again by any means short of absolute violence[x]. Buller, J. speaking of the same case, says, that it had never been impeached in the smallest degree, but, on the contrary, had always been mentioned by the court with approbation; but still (he says) it is to be remembered that it only relates to a transaction between the buyer and seller of the goods; and in the case of Lickbarrow and Mason, it never was the intention of the court to use a single expression that could impeach *that* authority. If the transaction be between the buyer and seller of the goods, and the former has not paid for them, the latter has a right to stop them *in transitu*, in case of the insolvency of the buyer. The case of Snee and Prescott went no farther than that[y]. Grose, J. also said, that it never was his intention in the case of Lickbarrow and Mason, to throw the least doubt on that of Snee and Prescott, and other cases which have held that the consignor of goods may obtain the possession of them before they reach the consignee, who becomes insolvent before payment[z]. Again, in Ellis and Hunt, Lord Kenyon observed, that the doctrine of stopping goods *in transitu* is bottomed on the case of Snee and Prescott, where Lord Hardwicke established a very wise rule, that the vendor might resume the possession of goods consigned before delivery, in case of the

[x] 2 T. R. 679. [y] *Id.* 681. [z] *Id.* 682.

the bankruptcy of the vendee; and on this all the other cases are founded [a].

Nisi prius decisions. The case of Appleby *v.* Pollock.

In the argument of the famous case of Lickbarrow and Mason, several *nisi prius* decisions were adverted to, by the bench and at the bar. Some of them came on before Lee, C. J., and the others before Lord Mansfield. They were chiefly in opposition to the doctrine laid down by the court of King's Bench, and in confirmation of the opinion of the court of Exchequer Chamber, which, however, was ultimately reversed in the House of Lords; though doubt has been entertained about the accurate statement of some of them, and others may have turned on their own particular circumstances; which of course materially derogates from their authority [b]. However, in the investigation of the very important question which they involve, it will be proper to notice them in this place, in the order of time in which they were decided. The first, before Lee, C. J. appears to have been an action of trover, by the assignee of a bill of lading, by indorsement for consideration, which was held to give the plaintiff a sufficient property to maintain the action; and the defendant, having relied on the bankruptcy of the consignee, and the stoppage of the goods in the hands of the master of the ship, under the process of the Admiralty Court in Scotland, *but which did not appear to have been executed within the jurisdiction of the court*, the Chief Justice directed the jury to find a verdict for the plaintiff [c].

The

[a] 3 T. R. 467. [b] See 1 H. B. 367, 8. [c] Appleby *v.* Pollock, Guildhall, T. 21 *Geo.* 2. Abbot 394.

The second case, before the same judge, was detinue against the master of a ship[d]. On the general issue pleaded, the case appeared to be as follows: One Hall, of Salisbury, had written to Askell and Co. merchants at Malaga, to send him twenty butts of olive oil; which Askell accordingly bought, and shipped on board the ship Tavistock, of which the defendant was commander. He signed three bills of lading, acknowledging the receipt of the goods, to be delivered to the order of the shippers. In the bills was the usual clause, that one of them being performed the other two should be void. The goods being thus shipped, Askell sent an invoice thereof, and also one of the bills of lading to Hall, indorsed by Askell, to deliver the contents to Hall; and Askell at the same time sent to Jones, his partner in England, a bill of exchange drawn on Hall for the amount of the price of the oils, and also another of the bills of lading indorsed by Askell, to deliver the contents to Jones. The bill of exchange was presented to Hall, but not being paid by him it was returned protested; whereupon Jones, on the 1st of September, 1752, (a day or two after the ship arrived) applied to the defendant to deliver the oils to him, and having produced his bill of lading, the defendant promised to deliver them accordingly. But the ship not being reported to the custom-house, the oils could not be then delivered; and before they were delivered, the plaintiff, on the 3d of September, produced the bill of lading sent to Hall, with an indorsement thereon

Fearon v. Bowers.

[d] Fearon v. Bowers, Guildhall Sittings, March, 1753, 1 H. B. 364, 5.

thereon by Hall to deliver the contents to the plaintiff, and also the invoice, upon the credit of which he had advanced to Hall £200. Notwithstanding this, the defendant afterwards delivered the oils to Jones, and took his receipt for them on the back of the bill of lading. For the plaintiff it was contended, that the bill of lading indorsed to Hall, and by him to the plaintiff, had fixed the property of the goods in the plaintiff: and that the consignee of a bill of lading has such a property that he may assign it over, according to Evans and Martlett[c]. It was farther insisted, that the plaintiff had advanced the £200 on the credit of this bill of lading, in the course of trade; and the indorsement was compared to the indorsement of a bill of exchange, which is good though the bill originally was obtained by fraud. Merchants were examined on both sides, and seemed to agree that the indorsement of a bill of lading vested the property; but that the original consignor, if not paid for the goods, had a right, by any means that he could, to stop their coming to the hands of the consignee, till paid for. It also appeared, by the evidence of merchants and captains of ships, that the usage was, where three bills of lading were signed by the captain and indorsed to different persons, the captain had a right to deliver the goods to whichever he thought proper; that he was discharged by a delivery to either, with a receipt on the bill of lading, and was not obliged to look into the invoice, or consider the merits of the different claims. Lee, C. J. in summing up the evidence, observed to the jury, that in point of law, a bill of lading transferred

[c] 1 Ld. Raym. 271

transferred the property, and a right to assign that property by indorsement: and the invoice strengthened that right, by shewing a farther intention to transfer the property. But it appeared in this case, that Jones received the other bill of lading as a check on Hall, who in fact had never paid for the goods. And the evidence was that, according to the usage of trade, *the captain was not concerned to examine who had the best right on the different bills of lading.* All he had to do was, to deliver the goods upon one of the bills of lading; which had been done. The jury, therefore, were directed by the Chief Justice to find a verdict for the defendant, which they accordingly did[f].

A *nisi prius* case before Lord Mansfield[g], has been cited as a legal authority in support of the doctrine laid down by Lord Hardwicke, in the case of Snee and Prescott[h]. Selvetti, a merchant in Italy, consigned a quantity of skins to Lingham, residing in London, and sent him a bill of lading indorsed in blank. Lingham, the consignee, indorsed the bill of lading to Savignac for a valuable consideration, shewing him at the same time the letters of advice and the bills of parcels. The consignee not accepting the bills of exchange which the consignor had drawn upon him for the amount of the goods, the consignor indorsed the bill of lading remaining in his hands to Cuff, the defendant, with orders to seize the goods before they got into the hands of the consignee, which he did: and

Savignac *v.* Cuff.

[f] 1 H. B. 364. [g] Savignac *v.* Cuff, Guildhall Sittings, Trin. 1778.
[h] 1 Atk. 245.

and the action was brought against him by the indorsee of the consignee, to recover the value of the goods. Wallace the Solicitor-General argued, that by the indorsement of the first bill of lading, the property was transferred. But Lord Mansfield was of opinion, that the consignor had a right to stop the goods *in transitu*, in case of the insolvency of the consignee; and that the plaintiff, standing in the same situation with the original consignee, had lost his lien. His lordship was first of opinion, that there was a distinction between bills of lading indorsed in blank and otherwise, but he afterwards abandoned that ground. Yet as the consignor had in point of fact received £150 from the consignee, there was a verdict for the plaintiff for that sum. So that the result of the verdict was, that the consignor was entitled, under these circumstances, to retain all the goods consigned, deducting only the sum which he had actually received [i]. Mr. Justice Buller, in observing upon this case in giving his judgment in Lickbarrow and Mason, said, that the note of it was too loose to be depended upon, and it was not to be supposed that Lord Mansfield had forgotten the doctrine he had laid down in Wright and Campbell [j], where he observed very minutely, that it did not appear at the trial that any letters were produced, and that no price was fixed for the goods; but in Savignac and Cuff, the plaintiff had not only the bills of lading and the invoice, but he had also the letters of advice, from which the real transaction must have appeared: yet if it was manifested that Selvetti had not been paid for the goods, that might have been a ground for the determination [k].

Mr.

[i] 2 T. R. 66. [j] 4 Burr. 2046. [k] 2 T. R. 74, 5.

The cases of Hunter v. Beal, and Stokes v. La Riviere.

Mr. Justice Buller on the same occasion also remarked, that the case of Hunter and Beal did not involve the general question in Lickbarrow and Mason; but only determined what was admitted in that case[l], that as between the vendor and vendee, the property is not altered till delivery of the goods[m]. With respect to the case of Stokes and La Riviere, perhaps there may be some doubt about the facts of it; however it was determined on a different ground, for the goods were in the hands of an agent for both parties[n]. That case therefore does not impeach the doctrine laid down in Wright and Campbell[o]. From all the cases which have been collected, it does not appear that there ever had been a decision against the legal right of the consignor to stop the goods *in transitu*, either as between the original parties to the consignment, or the consignor and assignee of the vendee or consignee, before the case of Lickbarrow and Mason[p]; and where there has been no direct decision on a point of law, which is of general concern in the daily business of the world, it is impossible to fix any standard of opinion upon loose reports of incidental arguments. The rule therefore which the court had to lay down in that case, was intended to have the effect not to disturb, but to settle the notions of the commercial part of this country, on a point of very great importance, as it regarded the security

[l] *Ante*, 399. [m] Hunter *v.* Beal, *coram* Lord Mansfield, C. J. Guildhall Sittings, Trin. 1785. [n] Stokes *v.* La Riviere, *Id.* Hil. 25 *Geo.* 3. 2 T. R. 75; and see 1 H. B. 367. [o] 4 Burr. 2046. [p] In K. B. 2 T. R. 63. In Exchequer Chamber, 1 H. B. 357. In House of Lords, 5 T. R. 367. In K. B. after 2d. trial, *Id.* 683.

security and good faith of their transactions[q]. How far the effect has been obtained by the different opinions and judgments which have been pronounced upon the case alluded to, and which of them is to be preferred, the reader will form his own opinion.

The case of Lickbarrow and Mason.

The facts of the case were shortly these: on the 22d of July, 1786, Messrs. Turings shipped on board the Endeavour, of which one Holmes was master, at Middleburgh, to be carried to Liverpool, a cargo of goods, by the order and directions and on the account of Freeman of Rotterdam, for which, several bills of lading of the same date were signed by the master, to deliver the goods at Liverpool, specified to be shipped by Turings to order or to assigns. On the same 22d of July, two of the bills of lading, indorsed in blank by Turings, were transmitted by them, together with an invoice of the goods, to Freeman at Rotterdam, and were duly received by him, that is, in the course of the post; one of the bills being retained by Turings. I here take no notice of there being four bills of lading[r], because on that circumstance no stress was laid. On the 25th of July bills of exchange for a sum of £477, being the price of the goods, were drawn by Turings, and accepted by Freeman at Rotterdam; and Freeman on the same day transmitted to the plaintiffs in the action, merchants at Liverpool, the bills of lading and invoice, which he had received from Turings, in order that the goods might be sold by them on his account; and drew upon them bills of the

[q] *Per* Lord Loughborough, 1 H. B. 369. [r] *Post*, 457, 8. One of them was kept by Holmes, the master of the vessel, 2 T. R. 63.

the same date, to the amount of £520, which were duly accepted, and were afterwards paid by them; for which they had never been reimbursed by Freeman, who became a bankrupt on the 15th of August following. The bills accepted by Freeman for the price of the goods shipped by Turings, had not become due on the 15th of August; but on notice of his bankruptcy, they sent the bill of lading, which remained in their custody, to the defendants at Liverpool, with a special indorsement to deliver to them and no other; which the defendants received on the 28th of August, 1786, together with the invoice of the goods and a power of attorney. The ship arrived at Liverpool on the 28th of August, and the goods were delivered by the master on account of Turings to the defendants; who, on demand and tender of freight, refused to deliver them to the plaintiffs [s].

The great question was, whether the vendor's right of stoppage *in transitu* could be divested by the vendee's indorsement of the bill of lading to a third person, *bonâ fide* and for a valuable consideration; and whether such indorsement was not an absolute transfer of the whole property. As this was a mercantile question of very great importance to the public, and had never received a solemn decision in a court of law, the court of King's Bench were desirous of having the matter argued a second time, for those reasons, rather than on account of any great doubts which they entertained on the first argument. Ashhurst, J. in giving his opinion, laid it down as a broad general principle,

Judgment of K. B. on first trial.

[s] Mason v. Lickbarrow, 1 H. Blac. 358.

principle, that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. He said, "although it would be very hard on a consignor, who has received no consideration for his goods, if he should be obliged to deliver them up in case of the insolvency of the consignee, and come in as a creditor under his commission for what he can get; it is a hardship which he brings upon himself. When a man sells goods, he sells them on the credit of the buyer: if he deliver the goods, the property is altered, and he cannot recover them back again, though the vendee immediately become a bankrupt. But where the delivery is to be at a distant place, as between the vendor and vendee, the contract is ambulatory till delivery; and therefore, in case of the insolvency of the vendee in the mean time, the vendor may stop the goods *in transitu*. However, as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud. The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect therefore it is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only. In the case of a bill of exchange, the general rule is, that as between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and an indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law,

law, and not on the custom of merchants. The custom of merchants only establishes that such instrument may be indorsed; but the effect of that indorsement is a question of law, and the rule is, that as between the original parties, the consideration may be inquired into, though when third persons are concerned, it cannot. This is also the case with respect to a bill of lading." After quoting the case of Wright and Campbell[t], Ashhurst, J. proceeded. "Now in this case, the goods were transferred by the authority of the vendor, because he gave the vendee a power to transfer them; and being sold by his authority, the property is altered. And I am of opinion that this right of the assignee could not be devested by any subsequent circumstances[u]." Mr. J. Ashhurst, as well as Buller, J. appears to have relied mainly on the authority of Wright and Campbell, in giving his judgment on this important occasion. Buller, J. took notice of one circumstance in the case, which is peculiar to it, not for the purpose of founding his judgment, but because he would not have it supposed in any future case that it passed unnoticed, and that it might not thereafter have any effect which it ought not to have. It was stated (he observed) that there were four bills of lading; and it appears by the books treating on this subject[v], that according to the common course of merchants there are only three; one of which is delivered to the captain of the vessel, another is transmitted to the consignee, and the third is retained by the consignor himself, as a testimony against the captain in case of any loose dealing. Now if it be the established course

[t] 4 Burr. 2046. [u] Lickbarrow v. Mason, 2 T. R. 70, 1, 2.
[v] *Ante*, 322, 3. 454.

course among merchants to have only three bills of lading, the circumstance of there being a fourth in this instance might, if the case had not been taken out of the hands of the jury by the demurrer, have been proper for their consideration. That circumstance appeared on the bill, on which was written, "In witness whereof the "master hath affirmed to *four* bills of lading, all of this "tenor and date." But (he said) we all know that it is not the practice, either of persons in trade or the profession, to examine very minutely the words of an instrument which is partly printed and partly written; and if we only look at the substance of such an instrument, this may be the means of enabling the consignee to commit a fraud on an innocent person. Then how stood the consignee in this case? he had two of the bills of lading, and the captain must have a third, so that the assignee could not imagine that the consignor had it in his power to order a delivery to any other person. But the learned judge declared that he meant to lay this circumstance entirely out of his consideration[w] in the judgment he should give in that case, which he thought turned wholly on the general question[x]. He then went into a minute and elaborate investigation of the authorities cited in the argument. His observations on the case of Snee and Prescott have already been noticed. He said that all the cases upon the subject, Evans and Martlett[y], Wright and Campbell[z], and Caldwell and Bull[a], as well as the universal understanding of mankind, precluded any question but that a bill of lading did transfer the property. There is

[w] See 2 H. B. 504. [x] 2 T. R. 72. 1 H. B. 358. acc. [y] 1 Ld. Raym. 271. [z] 4 Burr. 2046. [a] 1 T. R. 205.

is (he said) no weight in the argument of hardship on the vendor, because he has parted with the legal title to the consignee; at any rate, the argument from the hardship of the case is a bad argument in a court of law. And with respect to the argument from the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all, the answer is, that under those circumstances a bill of lading could not possibly exist, if the transaction were a fair one; for it would be a fraud in the captain in such case to sign the bill of lading, which is an acknowledgment of his having received the goods on board his ship. As the plaintiff Lickbarrow had paid a valuable consideration for the goods, and there was no colour for imputing fraud or notice to him, the learned judge was of opinion he was entitled to the judgment of the court [b]. Mr. Justice Grose did little more than observe, that the consignor and the assignee of the consignee do not stand in the same situation as the original parties; inasmuch as the consignor, by his indorsement, gives a credit to the bill of lading, and on the faith of that money is advanced. He entirely agreed with Mr. Justice Buller in all the observations he had made on the different cases cited, and that there should be judgment for the plaintiff [c].

Judgment of the Exchequer Chamber.

Lord Loughborough, in giving the judgment of the Exchequer Chamber in error, began by observing, that the defendants were not stakeholders; but the same in effect

[b] 2 T. R. 75, 6. [c] *Id.* 76.

effect as Turings, and their possession the same as Turings; and the plaintiffs, though they derived title under Freeman, did not represent him, so as to be answerable for his engagements; nor were they affected by any notice of those circumstances, which would bar the claim of him or his assignees. If they acquired a legal right, they acquired it honestly; and if they trusted to a bad title, they were innocent sufferers. The question then (he said) was, whether the plaintiffs had a superior legal title to that right; which on principles of natural justice, the original owner of goods, not paid for, has to maintain that possession of them, which he actually holds at the time of the demand. After stating the arguments, and some general observations on the nature and effect of a bill of lading, he proceeded to consider the effect of the indorsement of it, and the analogy which it bears to the indorsement of a bill of exchange; which had been so much pressed in the argument. What is it (said his lordship) that the indorsement of a bill of lading assigns to the holder or indorsee, but the right of the indorser? If any further effect were allowed to it, the possessor of an indorsed bill of lading would, in general, have greater force than the actual possession of the goods, in any other case than that of stoppage *in transitu*. Possession of goods is only *primâ facie* evidence of title: it may be precarious, as, in the case of a deposit; it may be criminal, as, in the instance of stolen goods; or it may be qualified, as in that of goods in the custody of a servant, carrier, or factor. Mere possession without a just title gives no property; the person to whom it is transferred by delivery, must therefore take the risk of the title of the person from whom

whom he obtains it[d]. It is no more difficult to inquire into the title of the person who professes to transfer property by indorsement of a bill of lading, than it is into that by which goods are otherwise pledged, sold, or assigned. An assignment of goods in pawn, or bought, but not delivered, cannot transmit a right to take the one without redemption, or the other without payment. The case of Evans and Martlett[e] only proves that the consignee of a bill of lading has such a property in the goods, as that he may assign it over to another; that is, such property and right to the goods as he himself had. His assignment can, in no case, convey an absolute property, where the assignor only had a conditional or defeasible right[f]. He cannot create a property to himself or his indorsee, by the *mere indorsement*. If it be said, that when the indorser has a good title to make the indorsement, and the interests of third persons are concerned, those interests ought not to be affected by the misplaced confidence of the consignor, and the subsequent default of the consignee, on whom the purchaser places no credit, he relying on the indorsement of the consignor; the answer is, that this argument proves too much[g]. If it be argued that it is necessary in commerce to raise money on goods at sea, and this can only be done by assigning the bills of lading, it may be asked, is it then nothing that an assignee of a bill of lading gains by the indorsement? He has all the right the indorser could give him; a title to the possession of the goods when they arrive. He has a safe security, if he has dealt

[d] See Hartop *v.* Hoare, 2 Str. 1187. 1 Wils. 8. S. C. [e] 1 Ld. Raym. 271. [f] 1 H. B. 360. [g] *Id.* 362, 3.

dealt with an honest man. And it seems as if it could be of little utility to trade, to extend credit by affording a facility to raise money by unfair dealing. Money will be raised on goods at sea, though bills of lading should not be negotiable, in every case where there is a fair ground of credit: but a man of doubtful character will not find it so easy to raise money at the risk of others[h]. With respect to the analogy contended for, between the indorsement of a bill of lading and a bill of exchange, his lordship observed, that they differed from each other as much as debts differed from effects. The indorsement of the latter, by the custom of merchants, passes a right to the money so completely, that the holder, for a valuable consideration without notice, is not in general affected even by the crime of the person from whom he received the bill. Bills of lading differ also essentially from bills of exchange in another respect, that the former are only used for one purpose, namely, to extend the credit by a speedy negotiation of the instrument, but the latter may be assigned for as many purposes as goods may be delivered[i]. To such instruments, so various in their use, it seems impossible to apply the same rules as govern the indorsement of bills of exchange. The silence of all authors treating of commercial law, is a strong argument that *no general usage* has made them negotiable as bills. Some evidence appears to have been given in other cases, that the received opinion of merchants was against their being so negotiable. And unless there was a clear, established general usage, to place the assignment of a bill of lading upon the same footing

[h] *Per* Lord Loughborough, 1 H. B. 362. [i] *Id.* 361, *et vide ante*, 325, 6.

ing as the indorsement of a bill of exchange, that country which should first adopt such a law, would lose its credit with the rest of the commercial world; for the immediate consequence would be, to prefer the interest of the resident factors and their creditors, to the fair claim of the foreign consignor. It would not be much less pernicious to its internal commerce; for every case of this nature is founded in a breach of confidence, always attended with a suspicion of collusion, and leads to a dangerous and false credit, at the hazard and expence of the fair trader[j]. The conclusions which follow from this reasoning, if it be just, are, 1st, That an order to direct the delivery of goods indorsed on a bill of lading, is not equivalent, nor even analogous, to the assignment of an order to pay money, by the indorsement of a bill of exchange. 2dly, That the negotiability of bills, and promissory notes, is founded on the custom of merchants, and positive law: but as there is no positive law, neither can any custom of merchants apply to such an instrument as a bill of lading. 3dly, That it is therefore not negotiable as a bill, but assignable; and passes such right, and no better, as the person assigning had in it[k]. For these reasons, Lord Loughborough declared it to be the opinion of the court of Exchequer Chamber, that the judgment of the King's Bench ought to be reversed[l].

After this excellent judgment of the court of Exchequer Chamber, a writ of error was brought in the House of Lords, when Buller, Ashhurst, and Grose, Justices, delivered their opinions for reversing that judgment; Judgment of the House of Lords, and of K. B. on second trial.

[j] *Per* Lord Loughborough, 1 H. B. 361. [k] *Id.* 362. [l] *Id.* 363.

ment; but Eyre, C. J. Gould, J. Heath, J. Hotham, B. Perryn, B. and Thompson, B. were of a contrary opinion. However, finally, the house reversed the judgment, and ordered the court of King's Bench to award a *venire de novo*, upon the ground that the demurrer to evidence appeared to be informal upon the record[m]. A copy of the very elaborate opinion of Mr. Justice Buller on the principal question, before the House of Lords, is to be found in Mr. East's reports[n]. At the second trial a special verdict was found, stating, in substance, the same facts as the former verdict, with this addition, that by the custom of merchants, bills of lading, and the property of the goods for which they are signed, are, after the shipment, and before the performance of the voyage, transferable by the shipper's indorsement and delivery; and that such bills drawn in blank, when filled up, have the same operation and effect as if they had been filled up by the shipper. On this special verdict, the court of King's Bench, understanding that the case was to be again carried up to the House of Lords, declined entering into a discussion of it, merely saying, that they still retained the opinion delivered upon the former case: and gave judgment for the plaintiffs. The marginal note of the report of Messieurs Durnford and East intimates the grounds on which this opinion proceeded, namely, that bills of lading are transferable and negotiable by the custom of merchants; and though a consignor may, in general, stop goods *in transitu*, in the event of the consignee's insolvency before they reach him, yet he cannot if the consignee

[m] 6 East 20, 1. [n] *Id.* to p. 36.

consignee have previously indorsed over the bill of lading to a third person, for a valuable consideration, and without fraud[o].

Recognition of this doctrine, in Salomons v. Nissen.

Notwithstanding the great majority of the judges appear to have given their opinions against the judgment of the court of King's Bench in this famous case, in all subsequent cases that judgment has always been spoken of with approbation, though an extension of it has been reprobated[p]. In Salomons and Nissen, Lord Kenyon said "the case of Lickbarrow and Mason had, in his mind, very properly narrowed that of Snee and Prescott; and decided, on principles of public policy and common honesty, that if goods come into the hands of a third person for a valuable consideration, *boná fide*, and without notice, he should not be prejudiced, because the consignor was so incautious as to trust the goods out of his possession without payment[q]. The other judges also thought, that although in general the consignor of goods is entitled to stop them *in transitu*, in case of the insolvency of the consignee, if he has not been paid for them; yet it was decided by the case of Lickbarrow and Mason, that the rule does not hold in the case of an assignment of the bill of lading to a third person, for a valuable consideration, without notice; because otherwise, the possession of the bill of lading by the consignee, makes him the visible owner of the goods, which would enable him to commit a fraud on third persons. They observed, that in Lickbarrow and Mason, and some

[o] Lickbarrow *v.* Mason, 5 T. R. 683. [p] See 1 N. R. 72, *per* Chambre, J. & 4 East 217. *per* Lord Ellenborough, C. J. [q] 2 T. R. 679. 80.

some other cases, the court had been obliged to consider whether in conscience, the rule in Snee and Prescott ought to be extended to third persons, and had held that it ought not, because it would put it in the power of the consignor to enable the consignee to cheat an innocent person: and he who contracts on the faith and credit of the bill of lading, should not be divested of his right. In Lickbarrow and Mason, a third person intervened, a fair and *bonâ fide* purchaser of the goods, under a bill of lading; which circumstance differs that case from the others, which were only between the original parties[r].

Oppenheim v. Russell.

In the case of Oppenheim and Russell, Lord Alvanley, C. J. said, that most unquestionably, the claims of third persons cannot be affected by the consignor's right to stop *in transitu*; for if, by any thing that had happened to the goods where they were deposited, any person had acquired a right in them before they absolutely became the property of the consignee, the consignor could not have resumed them without satisfying that right[s]. Again, speaking of the decisions in favor of indorsees of bills of lading, his lordship observed, that in those cases the consignor himself had enabled the consignee to raise money upon his goods; and it would have been monstrous to permit the consignor, after the credit obtained by means of his own bills of lading, to take the goods out of the hands of an assignee, in fact claiming under himself[t]. Chambre, J. adverting to the comparison which had been made in the argument, between the case of a carrier claiming a right of lien (as was that case) and an assignee of a bill

[r] 5 T. R. 682. [s] 3 B. & P. 47. [t] *Id.* 49.

bill of lading, says, "to be sure, two cases can hardly be stated more dissimilar. A consignee, by a bill of lading, receives what is considered a kind of negotiable interest, and for a valuable consideration; but there is no consideration to the consignor for extending the lien of the carrier. The consignee may, for a valuable consideration, negotiate the instrument, by the custom of merchants; but there is no custom to authorize a carrier's general lien against the consignor. In the former case, there is an instrument under the hand of the consignor himself, and the consignee acts as his agent in the disposal of the property; it is an assignment by the consignor himself[u]."

And in Newsom and Thornton, Lord Ellenborough said, he should be very sorry if any thing fell from the court which weakened the authority of Lickbarrow and Mason, as to the right of a vendee to pass the property of goods *in transitu*, by indorsement of the bill of lading, to a *bonâ fide* holder for a valuable consideration, and without notice[v]. Lawrence, J. observed, that in the case of Lickbarrow and Mason, some of the judges indeed compared a bill of lading to a bill of exchange, and considered that the indorsement of the one conveyed the property in the goods, in the same manner as the indorsement of the other conveyed the sum for which it was drawn. But when the case was before the Exchequer Chamber, there was much argument to shew, that in itself the indorsement of a bill of lading was no transfer of the property, though it might operate as such, in the same manner as other instruments may be *evidence* of the

Newsom v. Thornton.

[u] 3 B. & P. 54. [v] 6 East 40.

the transfer of property. As, if goods be sold by a merchant abroad to his correspondent here, and the bill of lading be sent to him, indorsed to deliver the goods to the vendee or his order; the transfer of the goods may be evidenced by such indorsement. And if the vendee part with the property in the goods while they are yet *in transitu*, and before his property in them is divested by the vendor's stopping them *in transitu*, and which assignment of the vendee's property may be evidenced in like manner by his indorsement to another, then, according to Lickbarrow and Mason, the original vendor's right to stop them *in transitu* would be divested. Therefore all that that case seems to have decided is, that where the property in the goods passes to a vendee, subject only to be devested by the vendor's right to stop them while *in transitu*, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration, and *bonâ fide*, by indorsement of the bill of lading[w]. And such an indorsement by a factor can only be upon a sale of the goods, and not merely by way of pledge[x].

Indorsement may prevail, although the assignee have notice that the goods are not paid for, in money.

The words "without notice," which are to be found in the case of Salomons and Nissen[y] and other cases on the subject, are not to be understood without notice that the goods have not been paid for, but without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable; the question being, according to Mr. Justice Buller in that case,

[w] 6 East 42, 3. [x] *Id.* 44, *per* Le Blanc, J. [y] 2 T. R. 671.

case, whether the purchaser takes it fairly and honestly? Therefore an indorsement of a bill of lading, *bonâ fide*, for valuable consideration, and without notice of any circumstance which ought in fairness to have prevented the party from taking it, passes the property in the goods; and prevents the right of stoppage *in transitu*, although the bill contain the usual clause for delivery to the shipper or his assigns, "he or they paying freight," and the assignee have notice that the goods are not paid for in money; if it appear that the price of the goods was payable by a bill of exchange, and at the time of the assignment of the bill of lading, the consignee has done all that the bargain required, by having accepted a bill, which was not due at the time of the indorsement. For that circumstance, alone, is not such as to make it unfair in the consignee to make, or the assignee to accept, the assignment[z].

The case cited was that of an action of trover, against the captain who signed the bills of lading. A cargo of wines was consigned by one Jean, of Jersey (the real defendant in the cause) to Maine, of London, who assigned the bill of lading to the plaintiff, for a valuable consideration. The invoice transmitted by Jean stated that the wines had been bought for account of Maine; a d at t e bottom was a memorandum signed with the plaintiff's initials, "payable by bill on London, at three months from 20th December, 1806." The bill of lading was dated 14th February, 1807, and was for delivery to Maine or his assigns, he or they paying Cuming v. Brown.

[z] Cuming v. Brown, 9 East 506. 1 Camp. 104, 180 c. S. C.

paying freight. A bill of exchange was drawn and accepted according to the contract; and the indorsement of the bill of lading to the plaintiff, which was for a full and valuable consideration, took place on the 23d of February, when the bill of exchange had a month to run. The consignee absconded. The captain, upon receiving an indemnity from the consignor to stop the goods *in transitu*, refused to deliver them to the plaintiff. The plaintiff's answer to a bill in Chancery was given in evidence by the defendant; which stated, that although the plaintiff was aware that the wines had not been actually paid for, by Maine or any other person, yet he concluded that they would be paid for, or credit given for them by Maine to Jean, in the course of their business together, and that a running account subsisted between them; and the plaintiff denied that, at the time of the indorsement or delivery of the bill of lading, he knew or believed, or suspected, that the consignee would be unable to pay for the goods, or that he had any reason so to believe. But it was objected on the authority of Salomons and Nissen, that as he was aware that they were then not paid for in money, he stood in the same situation as the consignee, and took the assignment subject to the consignor's right of stoppage *in transitu*. Lord Ellenborough, C. J. left it to the jury to consider, whether the indorsement were made by Maine to the plaintiff for a valuable consideration, and whether he had, at the time, notice of any circumstance which ought in fairness to have prevented his taking it. Under this direction, the jury found a verdict for the plaintiff[a].

A new

[a] 9 East 508.

Judgment of the court, in Cuming v. Brown.

A new trial was afterwards moved for, on the before-mentioned ground; when Lord Ellenborough (after stating the facts, and the questions submitted to the jury, with their finding) delivered the opinion of the court. The question (said his lordship) is, whether the "indorsement of the bill of lading, in this case, passed the property of the goods, the plaintiff having notice that the goods had not been paid for in money? It must be taken to have been found that the indorsement was *bonâ fide*, for valuable consideration, and without notice of any circumstance which ought in fairness to have prevented the plaintiff's taking it; unless indeed, notice that the goods had not been paid for in money be such circumstance [b]. But if we look at the actual facts of the case as between the consignor and consignee, by the memorandum at the foot of the invoice, transmitted before the bill of lading (and which arrived on the 3d of January, 1806), the price of the goods was 'payable in bill on London, at three months, from 20th December;' and at the time of the assignment, Maine, the consignee, had done all that such bargains required, by having accepted a bill on London at three months from the 20th December, which was not due at the time of the indorsement of the bill of lading, on the 23d of February. If therefore the plaintiff had known all the circumstances of the case, as they stood between consignor and consignee, he would have known nothing which would have made it unfair in the consignee to assign, or in himself to accept the assignment of the bill of lading [c] Here, any knowledge or suspicion of the kind

[b] 9 East 513. [c] *Id.* 514.

kind on the part of the plaintiff is negatived expressly, by the plaintiff's answer read on the part of the defendant. And if a bill of lading should be considered as not assignable under these circumstances, the consequence would be, that no bill of lading could be deemed safely assignable before the goods arrived, unless the assignee of the bill of lading were perfectly assured that the goods were paid for in money, or paid for in account between the parties, which is the same thing: a position which would tend to over-turn the general practice and course of dealing of the commercial world on this subject, and which position appears to be warranted by no decided case. The case of Salomons and Nissen[d], being a case of express fraud and *mala fides*, affords no principle to govern any other case, in which the absence of fraud and *mala fides* is found[e]."

Although risk of consignment remain in consignors.

Ninety-nine times in a hundred, the indorsement of a bill of lading will be conclusive evidence of the alteration of property, without ascribing to it the effect of a legal instrument, as a bill of sale; though cases may arise in which it would be difficult to understand that such was the meaning of the parties. The property may vest in the consignees notwithstanding the risk may remain in the consignors of the cargo, and notwithstanding the goods are to be sold with a view to the profit or loss of the consignors. Those circumstances will not prevent a transfer of the property under an agreement for a valuable consideration, though such agreement may not amount to a bargain and sale[f].

The

[d] 2 T. R. 674. 9 East 515. [f] Haille v. Smith, 1 B. & P. 570, 1, *per* Eyre, C. J.

The case of Haille and Smith came on to be argued upon a writ of error, a bill of exceptions having been tendered at the trial; by which it appeared, that the defendants in error, bankers and merchants in London, carried on the business of bankers under the firm of Smith, Sons, and Company, and the business of merchants under the firm of Smiths' and Atkinson. George and Henry Brown, merchants at Liverpool, having opened an account with the banking firm, agreed with them to consign, as a collateral security for their remittances to the house of Smiths and Atkinson, hemp and iron to the amount of £10,000. G. and H. Brown having drawn upon the banking firm to a considerable amount, in pursuance of the agreement, remitted to Smiths and Atkinson the invoice and bill of lading of the cargo, for which the action was brought, indorsed in blank. The plaintiff in error was captain of the ship, aboard which the cargo was loaded. Smiths and Atkinson afterwards applied to G. and H. Brown for directions respecting the disposal of the goods, and the sale prices; Smiths and Atkinson were to receive commission on the sales; and an insurance was effected in their names. G. and H. Brown became bankrupts, at which time the balance of accounts was considerably in favour of Smith, Sons, and Company, in consequence of which Smiths and Atkinson demanded the cargo of the captain of the ship; which was still lying in the port at Liverpool, it having been prevented from sailing by an embargo. But the captain refused to deliver the goods, in consequence of orders from Brown's assignees, to whom he afterwards delivered them. The judge's direction

Haille and Smith.

rection was in favour of the plaintiffs in the action; for whom the jury found their verdict. And, after two arguments, it was held that the property was transferred to Smiths and Atkinson, upon a trust, in which those who transferred the property and the banking-house were concerned, viz. that the proceeds, whatever they might be, should remain with the consignees, applicable to the debt of the banking-house; though the risk was necessarily to remain with the consignors, who were to be affected by the loss or profit upon the sale. The moment therefore the goods were put on board the ship, and the bill of lading was indorsed, and remitted to Smiths and Atkinson, the property was changed, and vested in them, subject to the above trust; notwithstanding the risk remained in G. and H. Brown or their assignees, who were also to be affected by the profit or loss which might arise upon the sale [g]. Such agreement, however, though for a valuable consideration, was held not to amount to any thing like a bargain and sale; for a bargain and sale, accompanied with a sufficient delivery to transfer the property, immediately throws the risk of the consignment, and the loss or profit of it, upon the buyers [h]. In Oppenheim and Russell, Lord Alvanley observed, that there was some difficulty in stating the several rights of the consignor and consignee. It has been determined, that the moment that goods are delivered by A. to a common carrier, to be by him forwarded to B., the property vests in B., and if they are lost, he, and not the consignor, is the person to bring an action for that loss. But

[g] Haille *v.* Smith, 1 B. & P. 570, 1, *per* Eyre, C. J. [h] *Id.*

But we must recollect, that though the property be in the consignee, still it is liable to be divested by the consignor, under certain circumstances; and when the right of resumption is exercised by the consignor, the property is re-vested in him. Though the consignee be the person who must sustain any loss happening to the goods, and therefore the carrier is principally his agent; still he is so far the agent of the consignor, that the law has said, the consignor has a right to take the goods out of the hands of the carrier, at any time before delivery to the consignee[1].

So, though the warehouse-room be payable by the vendor.

In a subsequent case, where it was admitted that the property passed to the vendee by the sale, but it appeared that by the custom of the trade, the vendor gave a sort of indulgence to the vendee by continuing to pay the warehouse-room for fourteen days afterwards, though in no other respect the vendor had any concern with the goods sold than a stranger: it was held, that although the goods continued in the warehouse of a third person after the sale, they were no longer in the possession of the vendor, and the contract being entire, and part having been taken away from the warehouse, the privilege of stopping *in transitu* was gone. Chambre, J. observed, that the payment of the warehouse-room by the vendor could not make a difference. The vendor of course charged just so much more as would pay the expence of the warehouse-room. If the expence had been paid by the vendee, it would not make a delivery at the wharf a delivery to him. Nor can the vendor avail himself of the circumstance of

[1] 3 B. & P. 48.

of the expences being paid by him, to prevent a delivery to the vendee from operating as such [k]. And it has been held, that if, after goods are sold, they remain in the vendor's warehouse, and he receives warehouse rent for them, this amounts to a delivery to the purchaser, so as to put an end to the vendor's right of stopping them, as *in transitu* [l].

What will not defeat the right of stoppage *in transitu*: part payment of the goods.

The consignor's right of stopping the goods *in transitu* is not taken away by the consignee's having partly paid for them [m]. To allow such an exception would be to destroy the rule itself; since every payment, however small, even the payment of a farthing by way of earnest, would, if such an exception were introduced, prevent the operation of the general rule of stoppage *in transitu*, in case of the insolvency of the consignee. The above opinion was delivered by Lord Kenyon, when this point first came before the court. The other judges, however, expressing a wish to consider whether the circumstance of part payment by the vendee took the case out of the general rule, and being desirous that there should be an uniformity of decision on the subject, another argument was ordered on this point. Afterwards, Lord Kenyon, C. J. delivered the opinion of the court in favour of the defendants, in substance, as follows: "We have looked into the cases cited, on the " point respecting the part payment of the goods by " the vendee; and as this is a case of great conse-" quence

[k] Hammond *v.* Anderson, 1 N. R. 72. [l] Hurry *v.* Mangles, 1 Camp. 452. [m] Hodgson *v.* Loy, 7 T. R. 440.

"quence to the commercial world, and as it is of vast "importance that questions which have been long set- "tled should not be set afloat again on account of "trivial circumstances, that formed no ingredient in "the decisions in which the general doctrine was "established, and as we have no doubt ourselves "on this subject, we think that the case should not "be argued again. When the distinction was first "taken at the bar, I thought it not well founded; "and on looking into the cases that were referred to "in support of it, we are clearly of opinion that the "circumstance of the vendee having partly paid for "the goods does not defeat the vendor's right to stop "them *in transitu*, the vendee having become a bank- "rupt; and that the vendor has a right to retake them, "unless the whole price has been paid. Indeed, the "Lords Commissioners seem to have been of the same "opinion in the case of Wiseman and Vandeput[n]; for "they decreed an account, and that if any thing were "due from the Italians (the consignors) to the Bon- "nells (the consignees), that should be paid to the "plaintiffs; but they should not have the value of the "silks by virtue of the consignment. Therefore, we "would not have it supposed that there is any doubt "on this question. The consequence is, that the "*postea* must be delivered to the defendants[o]; he agree- "ing to return the money paid."

Or acceptances given, and proved under commission of bankrupt.

In the case of Feize and Wray[p], the second point determined was, that the vendor of goods is not precluded from stopping them *in transitu*, by the circumstance

[n] 2 Vern. 204. [o] 7 T. R. 445, 6. [p] 3 East 93.

cumstance of the vendee's having accepted bills for the amount, which were proved under a commission of bankruptcy issued against him; such proof being only equivalent to part payment for the goods, and reducing the vendor's lien or claim upon them *pro tanto*, when he has got them into his possession.

Mere transmission of bill of lading, not equivalent to indorsement.

The mere transmission of a bill of lading to the consignee of the goods, is not equivalent to an indorsement of it by the consignor; nor sufficient to prevent the right of the latter to stop the goods *in transitu*, in the event of bankruptcy or insolvency; as appears by the following case. Abbott and Co, merchants at Oporto, shipped five pipes of wine on board a vessel by order of Fox, a merchant in London; and took from the master bills of lading, for delivery to order or assigns, one of which they transmitted to him in a letter, stating that they had shipped the wine on his account, and drawn upon him for the price. Fox accepted the bill so drawn upon him; but before it became due the wine arrived, and he not being able to pay the duties, it was sent to the king's warehouse, under the stat. 26 *Geo.* 3. c. 59. Whilst it remained there, Fox being indebted to one Mary Nix in a sum he was unable to discharge, sold her the wine in satisfaction of her debt, and soon afterwards became bankrupt. But the agents of Messrs. Abbott and Co. paid the duties, and got possession of the wine: whereupon Mrs. Nix brought an action against them for the value, which was tried before Lord Ellenborough at Guildhall. It was contended on behalf of the plaintiff, that the sending of the bill of lading by the consignors, in the letter

letter as before described, was equivalent to an indorsement of the bill of lading by them, and divested their right of stopping the goods *in transitu*. But his lordship declared himself of a different opinion; and that the right of the consignors to stop the goods was not, under the above circumstances, divested [q]. It will appear by the following cases, that to divest that right, the bill of lading must be actually indorsed, and *bonâ fide*, for a valuable consideration.

If indorsement be fraudulent, it is ineffectual to prevent right of stoppage *in transitu*.

If there be fraud between the consignee and his assignee of the bill of lading, it is the same as if the question were tried between the consignor and the original consignee [r]. If it appears to be a contrivance between the consignee of the goods and a third person to cheat the consignor, and the transaction between them is fraudulent, there can be no doubt but the indorsement and delivery of the bill of lading will not operate, so as to deprive the consignor of his right to stop the goods *in transitu*, in the event of the insolvency of the consignee; but then the facts of the case must plainly appear to be such as to warrant the conclusion of fraud. A case was reserved in an action of trover, stating, that Fontaine, a merchant in London, on the 4th of June, shipped goods, having first procured the master to sign two bills of lading to order or assigns. On the same day he indorsed one of the bills to one Swanwick, (a merchant in Liverpool), or order. On the 2d of July, Swanwick, being arrested for £40, applied to one Scott, another merchant at Liverpool, and to whom

[q] Nix *v.* Olave, K. B. T. 1805. Abbot 402, 3. [r] *Per* J. Buller, J. 2 T. R. 74.

whom he was indebted £800 on bill transactions, to become bail; which he ultimately did, upon Swanwick's indorsement to him or order of this bill of lading; Swanwick assuring him, contrary to the fact, that the goods were his own, and that he had paid for them. The next day Fontaine informed Scott, (as the truth was), that the goods had been consigned by him to Swanwick as factor only, for sale on his account. But Scott refusing to give up his claim, Fontaine indorsed the other bill of lading for delivery of the goods to the defendants. Scott afterwards became bankrupt, and the plaintiffs were assignees under his commission. The master of the ship, having obtained an indemnity from the defendants, delivered the goods to them. The plaintiffs (Scott's assignees) demanded the goods of the defendants, and tendered them the freight and other expences; but they refused to deliver up the goods. Lord Mansfield observed, that the whole of the case turned upon the question whether the transaction was *bonâ fide* between Swanwick and Scott, and for a valuable consideration and without notice, or a trick and contrivance between them to cheat Fontaine; which fact was not sufficiently stated, though the circumstances of the case, as stated, were excessively strong to shew that the transaction was fraudulent. Therefore a new trial was granted, without costs [s]. In the case of Newsom and Thornton, Lord Ellenborough, speaking of the case of Wright and Campbell, observed, that although that was the case of an indorsement of a factor, it was an outright assignment of the property for value: Scott, the indorsee, was to *sell* the goods, and

[s] Wright v. Campbell, 4 Burr. 2046.

and indemnify himself out of the produce, the amount of the debt for which he had made himself answerable. The factor at least purported to make a *sale* of the goods transferred by the bill of lading, and not a *pledge*[t]. And all that the courts appear to have decided in that case is, that if it were a *bonâ fide sale*, it would bind the principal: they did not go the length of saying that a *factor* could *pawn* the bill of lading received from his principal[u]. All the cases shew indeed, that where either vendee or factor intend to sell the goods, the indorsement of the bill of lading for that purpose will be binding. But the case of Wright and Campbell certainly is not an authority for holding that a factor may pledge the bill of lading, where he could not pledge the goods themselves[v]. Notwithstanding that case therefore, it may safely be laid down, that the indorsement of a bill of lading as a sale, in fraud of a third person is invalid; and if it be intended as a pledge, by a factor, whether fraudulent or not, it cannot be supported.

So, if the party ought not in fairness to have taken it.

In the case of Cuming and Brown, it was intimated by the court, that any circumstance which in fairness ought to have prevented the assignee of the bill of lading from taking it, would have placed him in the same situation with the original consignee, and not have taken away the consignor's right of stoppage *in transitu*; as, if it had appeared that the consignor, by the terms of his dealing with the consignee, had bargained for, or expected, that payment should precede the assignment of the bill of lading. So, if the assignee had assisted in contravening the actual terms of

[t] 6 East 41. [u] *Id.* 42. [v] *Id.* 44.

of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, the assignment would have been ineffectual, and he would have stood in the same situation with the consignee. If, for instance, he had known that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that, being accepted, it was not likely to be paid; in that case, the interposition of himself between the consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would have been in fraud of the consignor's right to stop the goods *in transitu;* and would therefore have been unavailable to the party taking an assignment of the bill of lading, under such circumstances, and for such purpose[*].

So if it be made as security for acceptances given by assignee, of less value than the goods, to one who becomes consignee's partner, with a knowledge that they were not paid for.

It is clear also, that the holder of a bill of lading by assignment, who has only given acceptances to the consignee, for less than the value of the goods, (the consignor not having received the price), has no right to them as against the original consignor, unless there has been an actual delivery; until which time, notwithstanding he is a *bonâ fide* holder of the bill, that will not of itself prevent the right of stoppage *in transitu.* And if the assignee make himself a partner with the original consignee in that particular consignment, (especially if he is to be the pay-master too), and it appears on the agreement of partnership that the goods are not paid for, he must take the bill of lading subject to the same rights as the consignee himself.

[*] *Per* Lord Ellenborough, 9 East 514, 15.

himself. For if one partner cannot recover the goods, the other cannot[x]; and as the holder of the bill must have known that the consignee had never paid for the goods, it is an agreement between them to obtain possession of the property without paying for it[y].

In trover, against the original shippers of the goods, a verdict was found for the plaintiff, subject to a case, in substance as follows. On the 1st of March, Hague bought £1000 worth of lead of the defendants, at Liverpool, to be shipped to Rouen. It was shipped at Chester, the 10th of March, when the defendants indorsed the bill of lading in blank, and sent it to Hague. On the 16th, the plaintiff gave Hague his acceptances for £700, on the security of the cargo; which acceptances he duly paid to the indorsees of them. On the 21st, it was agreed between the plaintiff and Hague, that the former should pay for the cargo, and send it in his name to Garvey and Co. merchants at Rouen, to be sold by them, and the nett proceeds to be remitted to the plaintiff; and that the profit and loss of the cargo should be equally divided between him and Hague, the latter agreeing to guarantee the due payment of the proceeds by Garvey and Co. The insurance was to be paid by Hague; but the policy to be kept by the plaintiff. The vessel was forced back to Chester by stress of weather; and Hague having become bankrupt, the defendants, not having received the price of the goods, on the 5th of April, took them from on board the ship. On the 25th of May, the plaintiff demanded Salomons v. Nissen.

[x] See Cox v. Hanbury, Cowp. 445, cited 2 T. R. 682. [y] Salomons v. Nissen, 2 T. R. 674.

manded the goods of the defendants, who refused to deliver them.

Judgment of the court.

Lord Kenyon, in giving judgment, said, that the case was widely different from that of Lickbarrow and Mason, and virtually the same as Snee and Prescott; for the plaintiff had not paid for the goods[1]. Ashhurst, J. also observed, that there were particular circumstances in this case, which distinguished it from that of Lickbarrow and Mason, because it appeared from the contract made on the 21st of March, that the plaintiff made himself a complete partner with Hague, *quoad* this transaction. And he not only made himself a partner, but by the terms of the contract he made himself the pay-master; therefore he put himself in the place of the original consignee, and must take the bill of lading subject to the same rights. That being the case, it followed as a necessary consequence, that the defendants had a right to stop the goods *in transitu*. And it would be a very hard case if they had not that power, for the plaintiff had not in fact been deceived; since, though Hague acted as the visible owner, yet it appeared on the agreement that he had not paid for the goods[2]. Buller, J. said, that it had been uniformly laid down as far back as he could remember, that good faith was the basis of all mercantile transactions; and therefore it is material in questions of this kind to consider, whether the purchaser has acted fairly and honestly, or with a design to deceive and defraud. In the case before the court, if the plaintiff knew at the time that Hague had never paid for the

[1] Salomons *v.* Nissen, 2 T. R. 680. [2] *Id.* 681.

the goods, it was an agreement between those two to obtain possession without paying for them. And the fact of the plaintiff's knowledge appeared on the face of the agreement, for he there agreed to pay for the goods himself. But there was still another ground which would prevent the plaintiff's recovering; for there was no doubt but that under the agreement the plaintiff and Hague were partners, and then the plaintiff could not recover in trover. He said it was like the case of Fox and Hanbury [b], where it was held that if one partner became a bankrupt, and the other partner afterwards disposed of the goods and he then became a bankrupt, the assignees of both, under a joint commission, could not bring trover against the vendee of such partnership effects. On both grounds therefore, he was of opinion that the *postea* must be delivered to the defendants [c]. Grose, J. said, the only ground on which the action could be supported was, by likening the case to that of Lickbarrow and Mason; but he thought it was totally unlike that case, for he considered the money paid by the plaintiff to Hague, in reality, as a loan to permit the plaintiff to enter into partnership with him. If so, the plaintiff must stand in the situation of Hague, who knew the whole transaction and that the goods were not paid for; it therefore came within the principle of Snee and Prescott. The agreement also, he said, shewed that the plaintiff himself knew that the goods were not paid for; he actually agreed to pay for them; so that he stood precisely in the same situation as the original purchaser of the goods. He agreed also with Mr. Justice Buller on

[b] Cowp. 445. [c] 2 T. R. 681, 2.

on the last point. For the plain intention of the agreement was, that the plaintiff and Hague should become partners in the transaction, and one partner could not recover those goods which the other could not. Accordingly, the *postea* was ordered to be delivered to the defendants [d]. In the case of Cuming and Brown [e], Lord Ellenborough (speaking of the case of Salomons and Nissen) observed, that it was a case of fraud on the part of the plaintiff, who had taken an assignment from the vendee, not only knowing that the goods were not paid for, but by his own agreement taking upon himself personally the immediate duty of paying for them; and he afterwards brought his action to take the goods out of the hands of the defendants the vendors without having paid for them, in fraud of the terms of his own express agreement with the original vendee, with whom he had become partner in profit and loss as to the goods, and with whom he had expressly contracted that he would himself pay for them [f].

If it be taken from merchants, with notice of previous sale by factors.

If merchants send goods to factors for sale, and transmit a bill of lading to them unindorsed; and the merchants, upon being requested to indorse the bill, write word to the factors that it was omitted to be indorsed by mistake, and that they will send one indorsed, whereupon the factors sell the goods to third persons, having previously effected an insurance upon the goods; but another person (having, for the honor of the merchants, paid bills drawn by them which they had not themselves been able to honor), with a knowledge

[d] 2 T. R. 682. [e] 9 East 515. [f] *Id.*

knowledge of all the facts, writes to the merchants for and obtains an indorsed bill of lading of the goods; such person cannot maintain an action against the master of the vessel for delivering them to the vendees[g].

The case was this: Thompson and Co. merchants in Ireland, had shipped a quantity of beef and pork on board a ship of which the defendant was master, to be conveyed to Eustace and Holland, their factors in London, for sale. They wrote to Eustace and Holland, directing them to make insurance, and promising to send the bill of lading; they afterwards sent a bill of lading, not indorsed by them, but with the names of Eustace and Holland. The factors effected the insurance, and wrote for an indorsement of the bill of lading; when Thompson and Co. answered, that if it was not indorsed it was a mistake, but they would send an indorsement. Whereupon Eustace and Holland sold the provisions to Boehm and Taylor. One Dick having afterwards paid, for the honor of Thompson and Co., certain bills of exchange drawn by them upon Eustace and Holland, and being in other respects a creditor of Thompson and Co., with a full knowledge of all the transactions respecting the consignment in question, wrote to them for an indorsed bill of lading of the consignment in question, which they sent him. Whereupon he demanded the provisions of the master of the vessel; but who, being indemnified by Boehm and Co. delivered the goods to them. Dick then brought trover against the master. And although it was contended, that the defendant could not dispute the plaintiff's title as indorsee of the bill of lading, and that

Dick v. Lumsden.

[g] Dick v. Lumsden, Peake's Rep. 189.

that Boehm and Taylor had no legal title, but only an equitable title to the goods: Lord Kenyon held, that the plaintiff, knowing all the circumstances of the case, could not by any subsequent act of his own, take the goods in question out of the possession of Boehm and Taylor. He said, though between persons ignorant of the transaction, an indorsement is the only transfer, yet where parties know the whole circumstances, a letter of this kind is a sufficient transfer of the property. The bills were not drawn precisely for these goods, but on the general account. The factor transferred the property; and having a competent authority so to do, it was not essentially necessary that he should have the possession of the goods, or an indorsement of the bill of lading. It is much like the case of a register county, as to the purchase of real property. If a man does not register his purchase deeds, and another person buys the estate without notice of the previous purchase, it will not affect him; but if he knows of such purchase, he cannot avail himself of the neglect to register [h]. Accordingly, the plaintiff was nonsuited.

If it be made upon a condition, not performed.

Where goods were consigned on the joint account of the consignors and consignee, and a bill of lading was sent to deliver the goods to the consignee or his assigns; who afterwards indorsed and delivered it to the defendants, upon condition of their making an advance to him on it, which they failed to do, but claimed to retain it as a security for prior advances; it was held that such indorsement and delivery of the bills of lading

[h] Dick v. Lumsden, Peake's Rep. 190.

ing did not divest the consignor's right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them[1].

An action of trover was brought for a quantity of pork, consigned by the plaintiffs, on the joint account of themselves and one Church, and the bill of lading was for delivery to him or his assigns; the plaintiffs drew a bill upon him for half the amount, but which was never paid by Church. Church becoming embarrassed in his circumstances, got the defendants to advance him a sum of money on the deposit of the bill of lading of some beef which had been consigned to him; and continuing to be embarrassed, previous to his departure for Ireland, about the 12th of May 1803, having before sent an order for the pork, he agreed with the defendants, *in consideration of a further advance*, to leave with them an order upon one Cole, who was his clerk, to indorse and deliver to them the bill of lading for the *pork* when it arrived; and upon his departure, he left word with Cole, that in case money was wanted during his absence, he should apply to the defendants for it, and indorse and deliver to them the bill of lading on its arrival. After Church's departure, Cole, who had received the bill of lading, applied to the defendants for an advance of £500 and upwards for Church, which they refused; but nevertheless contrived to obtain from him the bill of lading with his indorsement, he not being fully apprised of the agreement between them and his master, and understanding from them, that immediately previous to Church's departure for Ireland, they had made another advance to him upon the promise

Newsom *v.* Thornton.

[1] Newsom *v.* Thornton, 6 East 17.

promise of this assignment. Church stopped payment the latter end of June, and was soon after declared a bankrupt, not having paid for either the beef or pork. In the mean time, before he was declared a bankrupt, the pork having arrived, and the plaintiffs having been apprised of the insolvency of Church, they gave notice to the captain to stop the delivery of it to Church or to the defendants, and tendered him the freight and charges: the captain however delivered the pork to the defendants, upon their production of the bill of lading, and giving their indemnity. On tender to the defendants of the freight and other charges, they refused to accept them, or return the goods. Lord Ellenborough, in his direction to the jury, told them, that as the pork was consigned to Church on the joint account of himself and the plaintiffs, though he had a right to pledge it as a joint owner, yet having agreed to pledge it to the defendants only on condition of a further advance from them, and they having obtained possession of the bill of lading from his clerk with his indorsement, in the absence of Church, without complying with that condition, they had no right to retain the goods against the plaintiffs, who had applied in time to stop the delivery of them while *in transitu*, and were therefore entitled to recover the value. The jury accordingly found a verdict for the plaintiffs[j]. A motion was afterwards made to set aside this verdict; upon which his lordship said, that as there was no consideration paid by the defendants for the bill of lading of the pork (they not having in fact made any advance upon it as they had engaged to do, and upon the faith

[j] Newsom *v.* Thornton, 6 East 18, &c.

faith of which it was agreed to be deposited with them), there was nothing to divest the original right subsisting in the consignors, to stop the goods *in transitu* upon the insolvency of the consignee, who remained debtor for them. The other judges seemed to have considered this point so clear, that they did not speak particularly to it, but merely assented to the opinion delivered by the Lord Chief Justice[k]. The same point was ruled in a late *nisi prius* case. The indorsement of a bill of lading made the goods deliverable to one Voss, if he should accept and pay a certain draft or bill of exchange, annexed to the bill of lading; and if not, to the holder of the said draft. The bill of lading and draft being sent to Voss, he accepted, but did not pay the draft, and detached it from the bill of lading; which he then indorsed, for a valuable consideration, to the defendant. An action of trover was brought against him, by the holder of the bill of exchange, for the goods. And Lord Ellenborough held, that the special indorsement of the bill of lading ought to have made the defendant inquire, whether the condition on which the goods were deliverable to Voss had been fulfilled; and that after the dishonour of the bill of exchange, the property in the goods vested in the plaintiff; who accordingly had a verdict[l].

[k] Newsom v. Thornton, 6 East 40. [l] Barrow v. Coles, 3 Camp. 92.

CHAPTER

CHAPTER III.

OF THE DELIVERY SUFFICIENT TO PREVENT A STOPPAGE IN TRANSITU.

Contents of chapter.

IN discussing the subject of the present chapter, it will be convenient to consider, first, what delivery is sufficient to prevent the exercise of this right, in general; and, secondly, what delivery is sufficient for that purpose in the particular cases of a carrier, inn-keeper, &c. Under the first of these divisions, it will be proper to inquire how far there may be occasion for the corporal touch of the vendee, or delivery at his place of abode; or for any alteration of custody, or exercise of an act of ownership over the goods by him. And it will appear that all these circumstances are unnecessary; and that a delivery to him, or any of his servants, &c. is sufficient. But then it must be an actual, final, and absolute delivery, to divest the right of stoppage. What may or may not come within the description of such a delivery is then to be considered, before the particular cases above alluded to are investigated. And here it may not be improper to observe, that an *actual* delivery

delivery is spoken of in opposition to a constructive or supposed delivery to some third person (not the immediate agent of the vendee or consignee), for the purpose of forwarding the goods to him or his agents; a *final* delivery is opposed to that which is merely inchoate, or preparatory to such a delivery as is required by the contract; and an *absolute* delivery is mentioned in contradistinction from one, the completion of which depends upon the performance of a condition, expressly declared or impliedly understood between the parties.

It seems to have been once ruled by Lord Mansfield, that the goods must come to the *corporal touch* of the vendees, to prevent their being stopped *in transitu*. But his lordship having at the same time stated, that a delivery to a third person to convey them was not sufficient, the full extent of the proposition he then meant to lay down seems to have been, that if they were not stopped before they came *within the corporal power* of the consignee or his agent, the right of stoppage could not be frustrated. The case alluded to was an action of trover by assignees of bankrupts, for a bale of cloth, which was sent by Steers and Co. of Wakefield, to the defendant (who was an inn-keeper), directed for the bankrupts, to whom the defendant's book-keeper gave notice that a bale was arrived for them. Steers and Co. at the same time sent them a bill of parcels by the post, the receipt of which they acknowledged, and they wrote word of their having placed the amount to the credit of Steers and Co. The bankrupts gave orders to the defendant's book-keeper to send the bale down to the Galley Quay, in order to ship it on board the

No necessity for corporal touch of vendee.

the Union, to be carried to Boston. The defendant accordingly sent the bale to the quay; but arriving too late to be shipped, it was sent back to him. Within ten days afterwards, a clerk of the bankrupt went to the defendant's warehouse, when the defendant asked him what was to be done with the bale in question, and he was ordered to keep it in his custody till another ship sailed, as it was expected to do in a few days. The bankruptcy happened soon afterwards; and Messrs. Steers and Co. sent word to the defendant not to let the bale out of his hands: accordingly when the bankrupts applied for it, he refused to deliver it up. Lord Mansfield was clearly of opinion, that though the goods might be legally delivered to the vendees for many purposes, yet for this purpose there must be an absolute and actual possession by the bankrupts, or (as his lordship expressed it) the goods must come to the *corporal touch* of the vendees, otherwise they might be stopped *in transitu; a delivery to a third person, to convey to them, not being sufficient*[a]. It appears that Lord Kenyon also (probably on the authority of Lord Mansfield's opinion in Hunter and Beal) once said, that to confer a property on the consignee, a *corporal touch* was necessary. But his lordship afterwards regretted that the expression had ever been used, as (he said) it went too far. In the case alluded to, he observed, that if a corporal touch was necessary to confer a property on the consignee, it had taken place; but all that he thereby meant was, that the consignee should exercise some act of ownership on the goods:

[a] Hunter *v.* Beal, 3 T. R. 466, 7. 7 T. R. 444. S. C.

goods[b]: and even that will, on an accurate investigation of all the cases on the subject, be found unnecessary[c]. There have indeed been cases, where nice distinctions have been taken on the fact, whether the goods had or had not got into the possession of the vendee; but they all profess to go on the ground of the goods being *in transitu*, when they were stopped. As to the necessity of the goods coming to the *corporal touch* of the bankrupt; that is merely a figurative expression, and has never been literally adhered to. For there may be an actual delivery of the goods, without the bankrupt's seeing them; as, by a delivery of the key of the vendor's warehouse to the purchaser[d]. In the case of Dixon and Baldwin, Lord Ellenborough (alluding to the expression which had been used in the case of Hunter and Beal, that the goods must come to the corporal touch of the vendees), said it was a figurative expression, rarely if ever strictly true; and if it be not predicated of the vendee's own actual touch, it comes in each instance to a question, whether the party in whose hands the goods actually arrive be the vendee's special agent or representative, as contra-distinguished from a mere middle man, or agent for the conveyance of the goods in their transit towards the vendee[e].

Or delivery at his place of abode.

Nor is it necessary, in order to prevent the exercise of the right of stoppage, that the goods should have reached the consignee's place of abode, though they should even have been intended to be ultimately delivered

[b] Wright *v.* Lawes, 4 Esp. 85. [c] *Post*, 496. [d] *Per* Lord Kenyon, in Ellis *v.* Hunt, 3 T. R. 467, 8. [e] 5 East 1[illegible].

delivered there. All the cases prove this. But if any particular authority on the point were necessary, it is to be found in the case of Wright and Lawes. In that case, a cargo of wines were consigned to the plaintiff, who lived at Norwich; and the usual course was, to put goods intended for him into lighters at Yarmouth, and forward them to Norwich. But his agent received the wines, and not having sufficiently large cellars to hold them, deposited them in the cellars of the defendant at Yarmouth; and the plaintiff having been there and tasted the wines, that was held a complete delivery[f]; as the carrier then ceased to have any further care of them, having delivered them to the plaintiff's agent according to the bill of lading. In this case, it seems to have been supposed, that if the delivery was such as would enable the vendor to sue for the price, as for goods sold and delivered, it was also sufficient to divest the vendor's right of stoppage *in transitu*[g]. But this cannot be a true criterion; for immediately on delivery to the carrier such an action may be maintained, because the goods are then at the risk of the consignee; and it is clear from all the cases[h], that circumstance alone will not prevent a stoppage by the consignor.

Alteration of custody, or exercise of act of ownership.

Nor does it seem necessary that the actual custody of the property should be altered, or that the vendee should have exercised any act of ownership over it, if he direct the vendor to keep it for him for reward, and he assents to such direction. For, where it appeared

[f] Wright v. Lawes, 4 Esp. 82, *ante*, 420. [g] 4 Esp. 85, and see 1 Taun. 400. [h] *Ante*, 474, 5, *et vide post*.

peared that the plaintiff (who kept a livery stable, and dealt in horses) had refused the price offered for some horses by a purchaser, who afterwards sent word that the horses were his, but that as he had neither servant nor stable, the plaintiff must keep them at livery for him, whereupon the plaintiff removed the horses out of his sale stable into another; the question was, whether this was a sufficient delivery within the statute of frauds, to support an action for goods sold and delivered; and Sir J. Mansfield, C. J. was of opinion, at the trial, that it was. Afterwards, in delivering the judgment of the court, on a motion to enter a nonsuit, his lordship said, that he had relied upon the direction that the horses should stand at livery; and that the fact of their being put into another stable was wholly immaterial. The court thought the horses were, under the circumstances, the defendant's property and in his possession. The plaintiff might therefore sue for them, as sold and delivered to the defendant[i]. The Lord Chief Justice in this case, took occasion to observe, that it might appear hard that the plaintiff should not continue to have a lien upon the horses which were in his custody, so long as the price remained unpaid; but it was for him to consider that before he made his agreement. After he had assented to keep the horses at livery, they would, on the decease of the defendant, become general assets; and if he had been a bankrupt, they would have gone to his assignees. The plaintiff[j] could not have detained

[i] See 4 Esp. 82, and 1 Str. 167, *per* Fortescue, J. [j] In the report, plaintiff is used for defendant, and *vice versâ*.

detained them, although he had not received the price[k].

Delivery to consignee, or his servant, &c. sufficient.

To whatever principle the right of stoppage *in transitu* be referred, and whether it be of a legal nature, as the reservation of an original right of property in the consignor, or a lien on the property of the consignee, or of an equitable nature merely, it is clear that if the goods be once actually delivered into the possession of the consignee or purchaser, the property is thereby absolutely vested in him. The case is the same of a delivery to his servant or correspondent, authorized by him to receive the goods; for the possession of either of them is, in law, a delivery to the consignee himself. The question always is, whether the party to whom the goods actually come, be an agent so far representing the principal, as to make a delivery to him a full, effectual and final delivery to the principal, as contra-distinguished from a delivery to a person virtually acting as a carrier, or means of conveyance to or on account of the principal, in a mere course of transit towards him[l].

Delivery must be actual.

But to divest the consignor's right of stoppage *in transitu*, there must be an *actual* delivery of the goods to the consignee or his agent, &c. In the case of Oppenheim and Russell it was observed, that where there is an actual delivery the *transitus* is at an end but where the delivery is constructive, the law considers that as a delivery to certain purposes only; for it

[k] *Per* Mansfield, C. J. Elmore *v.* Stone, 1 Taun. 460, 1. [l] 5 East 184.

it is no delivery unless by a fiction of law, which cannot work injustice. It is a delivery so far as to make the carrier answerable to the consignee, to whom he has undertaken to carry the goods; but the fiction is never carried so far as to deprive the consignor of his right to resume them, if stopped before they have actually got to the possession of an insolvent consignee[m]. It is going a good way to bind even the consignee of goods by a fiction of this kind, where goods are sent to the consignee without his having chosen or directed any particular carrier or mode of carriage[n]. But it is now settled beyond dispute (though it was long a matter of doubt), that in general, immediately upon the delivery to the carrier, the goods are at the risk of the consignee, who has such a property in them as to enable him to maintain an action against the carrier in case of a loss; and such action must, in general, be brought at his suit, in respect of the property being defeasibly transferred to him, by the constructive delivery to the carrier; who is considered for that purpose as his agent or servant, whether he is expressly or impliedly named or appointed, or has been before employed by him, or not[o]. However, as will be seen hereafter, this sort of constructive delivery only vests a defeasible property in the consignee, liable to be divested by the consignor's stopping the goods in their passage to the consignee, or at any time before he, or his agent or representative, has taken the actual possession of them.

If

[m] *Per* Rooke, J. 3 B. & P. 50. [n] *Per* Chambre, J. *Id.* 52, 3.
[o] Dutton *v.* Solomonson, 3 B. & P. 582.

What an actual delivery. Marking the goods.

If the consignee, or his representative, as, in the event of his bankruptcy, the provisional or other assignee under his commission, in whom his property is vested, put his mark on the goods, when they have arrived at the end of their destined journey, and are deposited in a place of safe custody, though he do not alter the situation of the goods, that is a sufficient taking possession of them to prevent the vendor afterwards countermanding the delivery. In trover for a quantity of files, brought by the vendors against the carrier and the assignees of the vendee, a verdict was taken for the plaintiffs, subject to the following case. On the 31st of October, Moore, the bankrupt, ordered the goods from the plaintiffs, manufacturers at Sheffield. The plaintiffs drew a bill on the bankrupt for part of their value, which was dishonored. On the 15th, the docket was struck, and on the 18th a commission issued against him. On the 22d of November, the goods arrived by the waggon at an inn in London, where they were immediately attached by the bankrupt's other creditors, by process out of the mayor's court. On the 24th, a provisional assignment was executed to the messenger under the commission, who put his mark on the goods, but did not remove them. On the 13th of December, the plaintiffs demanded them of the master of the inn, and offered to indemnify him; but upon the attachment being afterwards withdrawn, he delivered the goods to the assignees, of whom they were then demanded, but who refused to deliver them up. And it was held that they were justified in so doing[p]. Lord Kenyon, C. J. observed, that by the assignment the bankrupt was stripped

[p] Ellis v. Hunt, 3 T. R. 464.

stripped of all his property, which was then vested in the provisional assignee who represented the bankrupt; therefore if a corporal touch were necessary, (which he thought it was not[q]) to defeat the right of the vendors, it had taken place. The goods were arrived at the end of their destined journey, and taken actual possession of for the use of the bankrupt by his representative; therefore they were no longer *in transitu*, and it was too late to countermand the delivery[r]. Ashhurst, J. said, that before the plaintiffs thought of countermanding the goods, the provisional assignee, who then stood in the place of the bankrupt, had actually taken possession of them, and put his mark upon them[s]. Buller, J. considered that circumstance as the strongest evidence of the consignee's having taken actual possession of the goods[t]. Grose, J. observed, that when they were marked, they were delivered to the consignee, as far as the circumstances of the case would permit; for the assignee could not take them away, as they were at that time under the attachment. After the mark was put on them, therefore, they were no longer *in transitu*, and consequently the plaintiff's right to seize them was at an end[u]. So, where A. sold a quantity of timber to B. on credit, who, before the credit expired, re-sold it to C.; and A. assented to such re-sale of the timber, part of which was marked by C. in A.'s presence; it was held that A. could not, afterwards, on the insolvency of B., stop any of the timber, as *in transitu*, as against C.[v]

If

[q] *Ante*, 493. [r] 3 T. R. 468. [s] *Id.* [t] *Id.* 469. [u] *Id.* 470.
[v] Stoveld *v.* Hughes, 14 East 308; *et vide post*, 504.

Paying warehouse-room, and taking samples of the goods.

If the mere circumstance of the vendee's being answerable for, or paying the warehouse-room for the goods were not sufficient to divest the vendor's right of stoppage *in transitu*[w]; it has been determined that if he not only pay for the warehouse-room, but also taste and take samples of the goods, that is a sufficient reduction of them into his actual possession, for that purpose[x]. Indeed those circumstances generally, though not always, follow the fact of previous actual possession. In the case cited, the plaintiffs, Bamford Bruin and Co. sold the wines in question to one Farquharson, the correspondent of Shevill, who had sold them to the plaintiff. Boardman, the plaintiff's agent, received the wines on his account; but his own cellars not being large enough to hold them, he applied to the defendant who took them into his cellars. The plaintiff went to the defendant's cellars where the wines were deposited, and tasted and took samples of them: these were held clearly sufficient acts of ownership to prevent the right of Bamford Bruin and Co. to stop the goods[y].

Weighing them, &c.

In the case of Hammond and Anderson, Mr. J. Chambre seems to have thought that the bankrupt having had manual possession of the goods, and weighed them all, and taken upon himself to separate them; those circumstances amounted to an actual delivery of the whole of the goods; independently of the delivery of part, which, in the case of a contract for an entire delivery, is of itself, in law, a delivery of the whole[z].

The

[w] *Vide post*, 503. [x] Wright *v.* Lawes, 4 Esp. 85. [y] *Id.* 82.
[z] 1 N. R. 72, 3. *Et vide post*, 506, &c.

Acceptance of ware-house-rent by vendor.

The acceptance of warehouse-rent for the goods by the vendor, of the purchaser, is evidence of delivery and complete transfer of the property to the latter, as much as if the goods were removed to his own warehouse. If I pay for part of a warehouse, so much of it is mine; and the warehouse-keeper can no longer say that the goods continue in his possession, as against the purchaser[a]. In trover for a quantity of oil, it appeared that the defendants (who were warehousemen) sold the oil in question, then lying in their warehouses, to I. S. for which he gave his acceptance. He afterwards re-sold it to the plaintiffs, who paid him for it; and afterwards demanded the oil of the defendants, who refused to deliver it, alleging the insolvency of I. S. But it appeared that they, had received warehouse-rent from him, for the oils remaining in their warehouse, after the period when it ought to have been taken away, according to the terms of sale. And Lord Ellenborough held this circumstance conclusive to shew that the *transitus* of the goods was at an end; though if there had been any conspiracy or contrivance on the part of the plaintiffs to cheat the defendants out of their goods, proof of that would have been an answer to the action[b].

Payment of rent to warehouseman, &c. or transfer in his books, or lodging with him delivery note.

The payment of rent by the vendee to the warehouseman, or person in whose custody the goods are, is a conclusive circumstance to shew on whose account the goods are held; but it is by no means a necessary

[a] Hurry *v.* Mangles, 1 Camp. 452. Harman *v.* Anderson, 2 Camp. 243. [b] Hurry *v.* Mangles, 1 Camp. 452.

cessary one to evidence that fact. For where goods are in the hands of a warehouseman or wharfinger, at the time of sale, the transfer of them into the name of the purchaser in the warehouseman's or wharfinger's books, and debiting him with the rent, are of themselves circumstances to shew the delivery of the goods to such purchaser; for, from that moment, the warehouse-keeper or wharfinger becomes the agent of the purchaser, on whose account he holds the goods; and the delivery is as completely executed as if the goods were in the purchaser's own hands. The same consequence results from the delivery note being lodged with the warehouseman or wharfinger, without any transfer being made in his books, and though nothing else be done by him to signify that he holds them on the purchaser's account; for, after the delivery of the note, he is bound to hold the goods on the account of the purchaser, and becomes his agent. He may himself have a lien on the goods, and be justified in detaining them till that is satisfied; but as between the vendor and vendee, the delivery is complete, and the right to stop *in transitu* gone[c]. Therefore if after the order for delivery is lodged with the warehouseman or wharfinger, he delivers the goods to the seller, he is liable to an action of trover at the suit of the purchaser, or his assignees, for their value[d].

Assent to re-sale by vendee, where nothing remains to be done by original vendor.

In ordinary cases, where the sale has been of chattels in their nature several, the transfer of the property from the vendor by means of an order for delivery, addressed to the wharfinger or other person in whose keeping

[c] Harman *v.* Anderson, 2 Camp. 243. [d] *Id.*

keeping they are, has been held equivalent to an actual delivery; the goods being at the time capable of such delivery. And the mere circumstance of the quantity purchased not being measured off, from a larger quantity of which it formed a part, and therefore being incapable of a separate delivery, is not of itself sufficient to take the case out of the general rule. As, where A. having forty tons of oil in one cistern, sold ten tons of it to B., who, after payment of the price, sold the same to C., and took his acceptance, and gave him an order on A. for delivery, which A. accepted: this was held to pass the complete property in the ten tons from B. to C., nothing remaining to be done on the part of B., who therefore could not, on C.'s bankruptcy before his acceptance became due, countermand the delivery; nor could the oil be considered as *in transitu*. For by A.'s acceptance of the order, he became the bailee of C.; and though as between him and B. the ten tons remained to be measured off, nothing remained to be done in order to complete the sale from B. to C.[e] So, where A. sold a quantity of timber lying on his own wharf, to B, for bills payable at a future day, and the timber was then marked by B, and part of it was forwarded to different places; after which B. sold the whole of it to C., who notified such sale to A., who assented to it, and then C. in A.'s presence, marked the timber remaining at his wharf, and afterwards marked the rest of it, which had been forwarded; it was held that A. could not, after this, stop any of the timber as *in transitu*, upon the insolvency

[e] Whitehouse *v.* Frost, 12 East 614; and see Hind *v.* Whitehouse, 7 East 558.

vency of B. the original vendee, before the day of payment had arrived, to whom payment had been made by C.; whatever question there might be between the original vendor and vendee, B. and C[f]. For A., who was the only person who could contravene the sale to C., assented to it, from which time C. became liable to him for the wharfage; and after the subsequent marking of the timber, it could no longer be considered *in transitu* to him, but in his actual possession[g]. It is observable, that in neither of the foregoing cases, any thing remained to be done by the original seller in order to complete the sale as between him and his vendee; but, on the contrary, in both of them, that sale was perfectly executed, and the re-sale assented to by the vendor. It will be presently seen, that if any thing remains to be done by the seller to ascertain the weight or quantity of the goods, on which the price is made to depend, until that is done the delivery cannot be considered as final[h]; nor is the person in whose custody the goods are authorized to deliver, or the vendee to take them[i].

Where delivery of part is delivery of the whole cargo. If the contract be for one entire delivery.

It has not only been a question when the *transitus* shall be considered at an end, but also where a delivery of part shall be taken as a delivery of the whole of the goods. In an action of trover by the shippers of the goods against the captain, and last indorser of one of the bills of lading, for a quantity of wheat, a special verdict was found, in substance as follows. The property was shipped by the plaintiffs on the 23d of January, at

[f] Stoveld v. Hughes, 14 East 308. [g] *Id.* 316, 17. [h] Wallace v. Breeds, 13 East 522. [i] Hanson v. Meyer, 6 East 614.

at Baltimore in Maryland, by the order and for the account of George and Henry Browne, when the captain signed *five* bills of lading[j], for delivery at the port of Cork or a market, to G. and H. Browne or their assigns; one of which bills was transmitted by the plaintiffs to G. and H. Browne, who, on the 7th of March, sold the wheat, and indorsed the bill to deliver it to Scott, or his assigns, to whom they delivered the bill with an invoice, and they drew upon him for the amount, which he paid. Scott afterwards indorsed and delivered his bill of lading to the Fox's, for delivery to them as his agent. The ship, on the 5th of March, arrived at Waterford instead of Cork, having been chaced by a privateer; and afterwards proceeded to Falmouth by orders of G. and H. Browne, at Scott's request, where she arrived on the 3d of April. On the 4th, the captain reported her at the custom-house, and made oath that the wheat was for the other defendants, the Fox's, who, on the 5th, made entry at the custom-house in their names, as agents of Scott. Eight hundred bushels of the wheat were taken out of the ship into their possession as such agents for Scott's account, between the 3d and 8th of April. G. and H. Browne became bankrupts on the 5th, and had not paid for the wheat. The plaintiffs, on the 8th of April, gave notice to the captain not to deliver the residue of the wheat to the Fox's, but to them, offering to pay his freight and charges; but the captain afterwards delivered it to the Fox's, who converted it to Scott's use. The court were of opinion, under the circumstances of this particular case, that the action could not be maintained; for the *transitus* was ended by the delivery of the 800 bushels of wheat,

[j] See 2 T. R. 72, *per* Buller, J.

wheat, which must be taken to be a delivery of the whole; there appearing no intention, either previous to or at the time of the delivery, to separate part of the cargo from the rest[k], and the contract being for one entire delivery[l].

If the contract be for one entire price; and an order be given for delivery of the whole of the goods.

In another modern case, the court relied upon the entirety of the price and mode of payment, and there having been a general order given for the delivery of the whole of the goods. The action was brought by the assignees of the vendee against the wharfinger, for a quantity of bacon. It appeared that the vendors having sold the bacon to the bankrupt, for a certain sum payable by a bill, on the 5th of March weighed it, and left an order with the defendant, at whose wharf the bacon lay, to deliver it to the vendee; that on the 9th, he again weighed the whole of it and took away part, leaving the rest at the wharf; that on the 10th, the vendors, hearing that the vendee was insolvent, ordered the defendant not to deliver the rest of the bacon to him, and indemnified the defendant against the consequences. The vendee soon afterwards becoming bankrupt, his assignees, the plaintiffs, demanded the bacon, which the defendant refused to deliver; although it appeared by the custom of the trade, where the goods sold continued to lie at the wharf after the sale, the charge of warehouse-room was borne by the vendor for fourteen days, at the expiration of which time, and not before, they were entered in the wharfinger's books in the name of the vendee. On a motion to set aside the verdict which the plaintiffs had obtained, and enter a nonsuit, Sir James Mansfield observed, that

[k] Slubey *v.* Heyward, 2 H. B. 509. [l] See Mr. J. Chambre's opinion in Hammond *v.* Anderson, *ante*, 502.

that although the right of stoppage *in transitu* was one which the courts of law are always disposed to assist, he did not know how to distinguish that from the case of Slubey and Heyward[m]. The contract (he observed) was entire; the whole quantity of bacon was sold at one entire price, to be paid for by one bill, and an order was given for delivery of the whole. The whole was weighed by the bankrupt, and he actually took away part. How could it then be said that he had not taken possession of the whole? However equitable the claim of the vendor might be, he was too late to take advantage of it; and it is of greater consequence that the law should be as uniform as possible, than that the equitable claims of an individual should be attended to[n]. Heath, J. considered that the entirety of the contract precluded the privilege of stoppage *in transitu*, after any part of the goods had been taken possession of by the vendee. Rooke, J. was of the same opinion, on the grounds mentioned by the Chief Justice. Chambre, J. said, that the privilege of stopping *in transitu*, appeared to him to have been carried far enough. It certainly (observed the learned judge) creates an inequality amongst the creditors, by giving a preference to one over the rest[o]; though there is no objection to the privilege itself, provided it be confined within proper bounds. But he thought there was a complete delivery of the goods, and that the case before the court was much stronger than that of Slubey and Heyward; which proceeded upon the principle that a delivery of part, where the contract was entire, was, in law,

[m] *Ante*, 506, &c. [n] See also 3 T. R. 468, 9, *per* Lord Kenyon, C. J. and Buller, J. acc. [o] See also 3 T. R. 468, *per* Ashhurst, J. acc.

law, a delivery of the whole. But in the case in question, he thought there was an actual delivery of the whole, the bankrupt having had manual possession of every article, and having weighed them all, and taken upon himself to separate them. All the court concurred in thinking that the vendor's liability for the warehouse-room, which was a mere indulgence to the vendee, did not prejudice his right [p]. The rule to enter a nonsuit was therefore, by the unanimous opinion of the court, discharged.

Qu. If there be a distinction between the vendor's delivery of part, and taking away part by the vendee?

It seems, therefore, that there may be a material distinction, between cases where the vendor, by himself or his servants, delivers a part of the goods to the vendee, and where the vendee himself, or a servant of his, separates part from the rest, and takes that part away; for in the latter case, though not in the former, he must first have manual possession of the whole, before he can take away any part. There was therefore considerable force in the argument used by Mr. Serjeant Marshall in the case of Slubey and Heyward, that before any part of the cargo could have been carried out of the ship, the whole must have been delivered on board to the agents of Scott. Perhaps the general principle for which he contended may not be untenable, viz. that when bulk is once broken, (which supposes an entire quantity contracted for), and any part delivered, it is a delivery of the whole to the consignee. The reasons urged in support of this argument are well worth perusal [q].

A delivery,

[p] Hammond *v.* Anderson, 1 N. R. 69, &c. *Ante*, 475, 502. [q] 2 H. B. 507.

A delivery, to prevent the vendor's right of stoppage *in transitu*, must be a complete and *final* delivery to the vendee; therefore, where the plaintiff went to the defendant's shop to purchase the goods in question, and the price was agreed upon, but the goods were not to be delivered then, as they remained to be engraved at the defendant's expence before delivery to him, and they were accordingly delivered to the engraver for that purpose; it was held, that while they continued in the hands of the engraver, who was employed by the defendant, the vendor, they were at the most only *in transitu*, and the price not being afterwards paid, he had a right to stop them, before the *final* delivery to the plaintiff[r]. There was no pretence for saying that the engraver was the servant of the vendee: he was the servant of the vendor[s]. The case cited is one of the earliest cases upon the necessity of a final delivery to the vendee, in opposition to an intermediate delivery to a middle man or third person, for a particular purpose. Delivery must be final.

In a *nisi prius* case before Lord Kenyon, which is more particularly noticed in other pages[t], his lordship appears to have held, that if goods, having arrived at Yarmouth, for the purpose of being forwarded to the vendee by lighters at Norwich, are received at Yarmouth by the vendee's agent, the vendor cannot afterwards take them as *in transitu*[u]. But in that case, the point to which Lord Kenyon's attention seems to have been principally directed, was, whether a delivery at *Qu.* Delivery at sea-port, to be forwarded?

[r] Owenson *v.* Morse, 7 T. R. 66; *et vide* 5 East 181. [s] *Id.*
[t] *Ante*, 82. 420. [u] Wright *v.* Lawes, 4 Esp. 84.

at the vendee's place of abode was necessary to put an end to the vendor's right of stopping the goods; which he (without any doubt, properly) decided in the negative. There, the goods were actually taken possession of by the vendee's agent at Yarmouth. But it will be found that all the cases upon the subject prove, that where the goods have not got to their journey's end, but have only arrived at some intermediate stage of it, where they are to be *forwarded* on without any new directions, such arrival is not deemed a termination of the transit of the goods to the vendee. So that the case alluded to, if it can be supported at all, must, it seems, rest principally, if not entirely, on the circumstance of the actual possession taken by the vendee's agent, and his terminating the transit of the goods at Yarmouth, by his actually reducing them into possession for his master at that place. And whether he could by so doing, destroy or hasten the termination of the vendor's right of stopping the goods, before they got to their journey's end, remains undecided by that case[v].

Lodging delivery note with warehouseman, &c. before weight or price of goods ascertained.

It has been more than once decided, and is now clearly settled, that if any thing remains to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, until that is done, though an order for delivery be given and lodged with the wharfinger, &c. that cannot operate as a final delivery so as to vest a complete present right of property in the buyer; who therefore cannot maintain an action of trover, which is founded on such right. Where the contract was for all the starch of the vendor

[v] *Vide ante*, 418, &c.

vendor, then lying at the warehouse of a third person, at so much *per* hundred weight; but the weight was not ascertained; though an order was addressed to the warehouse-keeper, and given to the vendee, to weigh and deliver to him *all* the starch: it was held that the property in the goods did not vest in the vendee before the weighing; and that notwithstanding part of the starch had been weighed and delivered to the vendee, yet upon his bankruptcy, the vendor might retain the remainder, which still remained in the warehouse in the name and at the expence of the vendor. For the price was made to depend upon the weight; and till that was ascertained, the warehouseman was not authorized to deliver, or the vendee to take the goods[w]. So, where the parties contracted for fifty tons of oil, and the purchasers received from the sellers an order on their wharfinger for delivery of that quantity, out of a larger quantity (ninety tons) of oil; yet, as the custom of the trade was for the casks to be searched by the sellers' cooper, and for a broker, on behalf of both parties, to ascertain the foot dirt and water in the casks, (for which allowance was to be made), and then they were to be filled up by the sellers' cooper at their expence, previous to delivery to the purchasers; it was held that on their insolvency and bankruptcy, before such acts done and delivery made, the sellers might countermand the delivery[x].

To

[w] Hanson *v.* Meyer, 6 East 614; and see Zagury *v.* Furnell, 2 Camp. 240. [x] Wallace *v.* Breeds, 13 East 522; and see Rugg *v.* Minett, 11 East 210.

The delivery must be absolute.

To divest the vendor's right of stoppage *in transitu*, the delivery of the goods must not only be actual and final, but *absolute*. A *conditional* delivery is not sufficient. *Before* the delivery to the consignee, the consignor may annex any condition to it, as, that the consignee shall give security for the goods before his taking actual possession of them; and if such condition be annexed to the delivery, and the condition be not afterwards complied with, the property of the goods will not be divested by the delivery: they may be stopped as *in transitu*, at any time before the condition is performed. But no such condition can be made effectual *after* the delivery. In the *nisi prius* case before Lord Kenyon, wherein he ruled (contrary to what is now clearly settled) that a delivery on board a ship chartered by the consignee was a complete delivery of the goods to him, so as to prevent a subsequent stoppage *in transitu*[x]: the plaintiff's counsel gave in evidence a letter from the plaintiff, the consignor, requiring the bankrupt consignee to give security to their correspondent in London, before the goods should be delivered. And Lord Kenyon said, the whole question was, whether there was a delivery to the bankrupt of the goods before the letter was written, or not; as before the delivery, the party may annex any condition to it, though not after[y].

Qu. What delivery by upholsterer's servant is sufficient?

In the recent case of Hunt and Stevens[z], a question arose whether a delivery of household goods was complete, to prevent a stoppage as *in transitu*, the upholsterer's

[x] *Post*, 533, &c. [y] Bohtlinck *v.* Snieder, 3 Esp. 58, 9. *Per* Mansfield, C. J. in Elmore *v.* Stone, 1 Taun. 460, 1. acc. [z] 3 Taun. 113.

holsterer's servant still continuing in the vendee's house where the goods were, and the vendee not having taken actual possession. The plaintiff declared as administrator, in trover, for certain household furniture, upon a conversion after the intestate's death; and it appeared in evidence that the deceased employed the defendants (who were upholsterers) to furnish a house; and they had accordingly, about a fortnight before his death, sent in goods to a large amount, and placed a man in the house; who stated in evidence, that without an order from the defendants, he should not have permitted the deceased to take possession of the furniture; but the purpose for which he was placed there was the superintending repairs, and disposing the furniture. The work was completed. The deceased had effected an insurance on the furniture, and was preparing to go, on the 5th of February, to inhabit the house, but died on the 3d of that month. In the night of that day, the plaintiff (who was a judgment creditor, and had an assignment of the goods in question, but had not obtained an inventory) endeavoured to possess himself of them, under an execution; but the defendants conveyed them away privately the same night. Mansfield, C. J. left it to the jury to determine whether there ever had been a complete delivery of the goods, such as to put them wholly into the possession of the deceased, and out of the power of the defendants; and the jury, thinking that there had not, found a verdict for the defendants. On a motion for a new trial, it was contended against the rule, that upon the evidence the delivery was not complete, the defendant's servant still continuing in possession, which circumstance was said to be at least equivocal; and the deceased never

 himself

himself had possession. Lawrence, J. suggested the case of a loss by fire: seemingly intimating an opinion, that the goods were at the risk of the vendees in the event of such a loss; though that circumstance alone, certainly would not, as contended, (by the defendants' counsel), be sufficient to take away the vendor's right to stop the delivery. However, the point was not decided; the court declaring that the learned serjeant who argued in support of the rule could not arrive at the consideration of the merits, as the letters of administration were on too low a stamp [a].

Remaining contents of chapter.

It remains to consider what delivery is or is not considered sufficient to prevent the stoppage of goods *in transitu*, in particular cases, such as were adverted to in a previous page [b]. And the most effectual and satisfactory mode of conveying the learning which the books afford on this subject will be, to state the authorities to be found upon each of those cases, 1st, as to the effect of a delivery to a carrier; 2dly, an innkeeper; 3dly, to a packer; and 4thly, to a wharfinger or warehouseman. After which, it will be proper to notice the cases relative to the effect of a delivery of goods for the vendees at a sea-port, to be forwarded in lighters, or to await their directions, or of a delivery into the king's stores; and the distinction which has been taken between a delivery on board a chartered and a general ship. This will close the observations to be made upon the subject of stoppage *in transitu*; though the

[a] Hunt v. Stevens, 3 Taun. 116.

[b] *Ante*, p. 492.

the remaining chapter, on the rescinding of the contract in the event of insolvency or bankruptcy, is most intimately connected with that subject; of which however it cannot be properly called a part.

Constructive delivery to carrier, not sufficient to prevent stoppage *in transitu*.

It is now clearly established, as a general rule, that the consignor of goods may, in case of the insolvency of the consignee, stop them at any time before they get into his actual possession; they being, until that time, still *in transitu*. Therefore it is, that a delivery to a carrier, though sufficient in general to vest the property of the goods in the consignee, is not enough to prevent the right of stoppage *in transitu*. A constructive possession is not sufficient for that purpose. To destroy the right, the goods must be actually delivered; for the delivery may be countermanded at any time before they get into the actual possession of the consignee. This is said to have been laid down as the rule by Lord Hardwicke, in Snee and Prescott[c]. But what is considered as a sufficient taking of actual possession on the part of the consignee, or a sufficient countermand on the part of the vendor, remained to be decided by subsequent cases. With respect to the former, in the earlier cases, the line has been precisely drawn; and they all turn on the question, whether or not there had been an actual delivery to the bankrupt. It is of the utmost importance to adhere to that line; if it be broken through, it will endanger the authority of the cases that have been decided, and fritter away the rule entirely. In one of those cases, Lord Mansfield took the

[c] 1 T. R. 465, *arguendo*.

the distinction, between an actual and a constructive delivery to the vendee. There may be cases where, as between the buyer and seller, if no bankruptcy or insolvency happen, the goods are considered in the possession of the buyer the instant they get out of the possession of the vendor; as, if A. orders goods from B. to be sent by a particular carrier at his own risk, the delivery to the carrier is a delivery to the vendee to every other purpose; but still, if he become a bankrupt before the carrier actually delivers them to him, the vendor may seize them; because this is only a *constructive* delivery to the vendee: an *actual* delivery is therefore necessary to divest the vendor's right of stopping the goods *in transitu*[d]. This was decided in the case of Stokes and La Riviere. One Duhern, living at Lisle in Flanders, sent an order to the plaintiffs for goods to be consigned to him; they were accordingly *sent by the particular conveyance mentioned in the instructions*, by the way of Ostend; at which place, before they got to Duhern, they were attached by the defendant, for a debt due to him from Duhern; but not till after the plaintiff, hearing of the insolvency of Duhern, had countermanded the delivery: and Lord Mansfield held that the *constructive* possession of the consignee, to whose *special agent* the goods had been delivered in London, *for the purpose of being transmitted* to him, was not to be regarded; but there must be an *actual* delivery to the consignee himself[e]. This case has

[d] *Per* Buller, J. in Ellis *v.* Hunt, 3 T. R. 469. [e] Stokes *v.* La Riviere, 3 T. R. 466; and see 3 East 397, S. C.

has since been stated by Lord Ellenborough, as a clear case of transit, not finished at the time of the claim made[f]. The same doctrine seems to have been recognized and acted upon in the case of Hodgson and Loy[g]; though the judgment of the court in that case was confined to the question, whether the right of stoppage *in transitu* was prevented by the consignee's partly paying for the goods. And in the case of Bohtlinck and Inglis, Mr. Justice Lawrence, in delivering the opinion of the court, recognized the opinion of Mr. Justice Buller in Ellis and Hunt, that an *actual* possession was necessary to deprive the consignor of his right of stoppage *in transitu;* observing, that it had been repeatedly determined, that the possession of a carrier is not such a possession[h].

It has also been determined, that an usage for carriers to have a lien on goods for the general balance of their account, between them and the consignees, cannot affect the right of the consignor to stop the goods *in transitu*. And such a lien cannot be established by a general notice, that the carrier would claim it against the owners of goods.[i] In an action of trover, tried before Lord Alvanley, C. J. it appeared that the defendant was a common carrier from London to Exeter and Plymouth, and as such received the goods in question from the plaintiffs, by whom they were consigned to the house of Negretti and Co. at Plymouth. Negretti and

Carrier's lien for general balance against consignee cannot affect consignor.

[f] 5 East 185. 7 T. R. 440. [g] 5 East 185. *Ante*. [h] 3 East 395.
[i] Oppenheim *v.* Russell, 3 B. & P. 42.

and Co. had given no orders to send the goods by any particular carrier, though there was another by whom they might have been sent. Previous to the arrival of the goods, Negretti and Co. failed; and notice was given to the defendant not to deliver the goods to them, but to the plaintiffs; who tendered the charge for carriage, and an indemnity. But the sum of £4. 7*s.* being due from Negretti and Co. to the defendant, for the previous carriage of other goods, he demanded this sum also; having given notice in the newspapers, and by hand-bills, that he should exercise a right of lien for his general balance from the owners of goods; one of which hand-bills had been delivered to Negretti and Co. The defendant offered evidence that it was the usage amongst carriers to detain goods for their general balance; but Lord Alvanley rejected the evidence as inadmissible, to affect the consignor's right of stoppage *in transitu*, and a verdict was found for the plaintiffs.

Judgment in Oppenheim v. Russell.

On a motion for a new trial, the judges delivered their opinions at length, not only upon the validity of the usage in general, but also its effect in that particular case. With respect to the latter point, Lord Alvanley was of opinion, that evidence of the usage was inadmissible in this case; because, if proved, it would not affect the consignor's lien. He thought it a monstrous proposition, that an agreement between the consignees and the carriers could put an end to the right of stoppage *in transitu* in the consignors, before that agreement existed, for the carrier comes in under the consignee; and the consignor may, therefore, resume the goods without satisfying any rights derived under the consignee,

signee, if he claim to resume them before the latter has a complete dominion over them. Neither the consignee, nor any person claiming under him, had attempted to exercise such dominion before the consignor's claim. It was not even in evidence that the consignor had notice of the defendant's terms of carriage, though his lordship's present opinion was, that he had no right to make such terms with the consignor; and he expressed a hope it would never be established that common carriers, who are bound to carry goods for a reasonable price, may impose such conditions upon persons sending goods by them [j]. Heath, J. put the case, that the consignee was not to be found; in which case the carrier certainly could not, as against the consignor, contend, that there was a running account between him and the consignee [k]. Rooke, J. observed, that the defendant's claim was founded on special agreement and particular usage only, not on general principles of justice. It was not likely that the consignor would waive his own right of stopping *in transitu*, if it was required of him; and the special agreement of the consignee ought not to bind that right [l]. If the consignee be in arrear with the carrier, it is by the carrier's own laches, for they have an undisputed lien for the carriage of each parcel of goods; he therefore was of opinion, that it would have been useless to have received the evidence [m]. Chambre, J. thought that as the carrier derived his right from the consignee, and the property supposed to be vested in him, he could only have a similar interest with the consignee.

[j] Oppenheim *v.* Russell, 3 B. & P. 46, &c. *Et vide ante*, 318. [k] *Id.* 49, 50. [l] *Id.* 126. acc. [m] *Id.* 50, &c.

consignee. He said, it was beyond all doubt that the carrier had a lien as against the consignor, for the carriage of the particular goods; but that lien was satisfied by the tender and refusal; and he did not think the notice went the length of affecting the consignor beyond that extent, it being only in general terms, that the goods should be subject to the general balance due from the respective owners; and in this case, there was no sum due from the consignor beyond the carriage of the particular goods [n]. But if it were intended to subject the goods of the owner, not only to any debts which he might himself owe for carriage, but to the debts of another man, if it was so manifestly unreasonable and monstrous, then no legal agreement could be implied from it [o].

Delivery at an inn, to be *forwarded* by a canal to the vendee, not sufficient.

Where the goods are sent to an inn, to be forwarded by a canal to the vendee, but with instructions to deliver them to the vendor's order, the delivery at the inn is not a delivery to the vendee; and therefore, before their arrival at their ultimate place of destination, the vendor may stop them as *in transitu* [p]. In the case cited, the proof was, that the defendant (who resided at Liverpool) having written to the plaintiff to purchase him certain cottons, to be paid for in a month; on the 11th of February the plaintiff having purchased the goods of one Whittey, sent them to the Axe inn at Aldermanbury, to be forwarded by the Paddington canal to Liverpool, but with instructions to deliver them to his own order, as his

[n] Oppenheim v. Russell, 3 B. & P. 53, 4. [o] *Id.* 52, *et vide* 3 B. & P. 126, 7. [p] Hurst v. Holding, 3 Taun. 32.

his usual course of dealing with the defendant had been. They were forwarded on the 18th from the Axe inn; when Whittey, who had sold them, hearing rumours against the defendant's credit, applied to the plaintiff to stop the cottons; who accordingly gave directions at the Axe inn, that they should not be delivered without payment; and they were accordingly stopped on the canal, and did not arrive at Liverpool till the 10th of March, when the month's credit was expired. They were then offered to the defendant on payment of the money, but refused; whereupon the plaintiff paid Whittey for the goods, and sold them by auction on the defendant's account. And it was held, that the delivery at the Axe inn was not a delivery to the defendant; and the plaintiff, having afterwards stopped the goods, could not recover commission, or the money paid Whittey for them[q].

Aliter, if original transit ends there, and they are afterwards sent from thence, by him, in a new direction.

In the case of Dixon and Baldwin, Lord Ellenborough observed, that he could not but consider that in Hunter and Beale, before Lord Mansfield[r], the transit was once completely at an end, in the direct course of the goods to the vendee, when they had arrived at the inn-keeper's, and were afterwards, under the immediate orders of the vendee, thence actually launched again in a course of conveyance *from him* in their way to Boston; being in a *new direction* prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete; the *transitus* for the purpose of stoppage cannot commence *de novo*, because the goods are again sent upon their

[q] Hurst *v.* Holding, 3 Taun. 36. [r] 3 T. R. 466.

their travels, towards a new and ulterior destination[r]. Mr. Justice Le Blanc also, with respect to the case of Hunter and Beale, observed, that the merchants there, the vendees, having given the goods a *different direction* after they got to the inn, and before they were stopped, he should have thought that the transit was at an end[s].

Delivery to a packer is not sufficient, if he be a mere middle man, to forward the goods.

Where goods are sent by orders from the vendee to a packer, the packer has been sometimes considered as a middle man between the vendor and vendee; in which case, the goods may be stopped as being *in transitu*, on the bankruptcy of the vendee. This is said to have been determined first in the King's Bench, on a motion for a new trial[t]. The case however seems to amount to no more than this: if a man living at a distance, or abroad, direct goods to be sent to his packer, *in order that he may send them on* to him, in such case, the packer is a mere middle man, with respect to the right of stopping *in transitu*[u]. In those cases where the *transitus* of the goods has not been considered as at an end, in the hands of a packer, they have only remained with the packer for the purpose of being forwarded to some ulterior destination[v].

Aliter, if he have the entire choice of the market.

Where it appeared that the goods were not sent to the carrier for delivery to the foreign house for which they

[r] 5 East 184. [s] *Id.* 188. [t] Hunt *v.* Ward, cited *arguendo*, in Ellis *v.* Hunt, 3 T. R. 467. [u] *Per* Lord Alvanley, in Scott *v.* Pettit, 3 B. & P. 461. [v] *Per* Rooke and Chambre, Justices, *Id.* 473. See also 2 B. & P. 463, *per* Chambre, J. and 5 East 186, *per* Lord Ellenborough.

they were purchased, but the agent of that house in London ordered them to be sent *for him*, to the house of a packer there, to await his disposal, he being invested with authority to dispose of them at such market as he should think proper; and after their arrival, he ordered some to be unpacked and sent away, and the remainder to be re-packed; it was held, in an action against the packer, that delivery to the carrier was clearly a delivery to the agent in London, and the goods were received by the defendant on his account, which terminated the *transitus* of them, and the plaintiff's right to stop them *in transitu*[w]. The case was this. The goods were purchased of the plaintiffs at Manchester, by one Moisseron, the general agent of Le Grand and Co. at Paris, in the name of that house. It appeared that he held a general power to send the goods to Paris, Holland, Germany, or such other market as he should think most beneficial. The goods were, by his directions, sent, for him, to the house of the defendant, a packer in London. Upon their arrival there, Moisseron came, and had some of the goods unpacked and sent away, and the rest re-packed; and whilst those remained in the house, news arrived of the failure of Le Grand, and Co.; whereupon the plaintiffs tendered the defendant his charges, and required him to deliver the goods to them; and on his refusal, brought an action of trover. But Lord Alvanley, C. J. at the trial, was of opinion that the action could not be maintained; and, by his lordship's direction, a verdict was found for the defendants[x]. On a motion for a new trial, Lord

[w] Leeds *v.* Wright, 3 B. & P. 320, recognized by Lord Ellenborough, 5 East 185, 6. [x] 4 Esp. Rep. 244, 5. S. C.

Lord Alvanley observed, that the goods were not sent to the defendant to be delivered by him to the house of Le Grand and Co. at Paris, but they were sold to Moisseron, the agent of that house in London, and, by his orders, sent for him, to the defendant there, to await his disposal; he being invested with authority to send them to such market as he should think most advisable. The goods, therefore, were received by the defendant, not on the account of Le Grand and Co., but on that of Moisseron. The delivery to the defendants was clearly a delivery to Moisseron, although the goods were intended for exportation; and indeed his conduct shewed that they were so considered, since, after their arrival at the defendant's house, he ordered some to be unpacked and sent away, and the remainder to be repacked. None of the cases cited, therefore, applied. Indeed Moisseron might, if he had so pleased, have made London the place of their ultimate destination, and disposed of the goods there. Heath, Rooke, and Chambre, J. concurring, Best Serjeant took nothing by his motion[y]. In Scott and Pettit[z], Lord Alvanley said, that in the case of Leeds and Wright, the court held that the goods, though remaining in the packer's custody, had arrived at the end of their journey; for the packer in that case, was not merely a middle man.

So, if consignee have no warehouse of his own.

In another modern case, of trover at the suit of assignees of a bankrupt against a packer, it appeared that the goods were ordered by the bankrupt, a merchant in London,

[y] 3 B. & B. 320, 1. [z] *Id.* 472.

London, of Messieurs Wallers at Manchester, and were forwarded by them to him at the Bull and Mouth inn on the 16th of March; the bankrupt having previously absconded, without leaving any particular orders about the goods. On the 23d of that month, they were sent from thence to the defendant's house, in consequence of general orders from the bankrupt, who had no warehouse of his own. On arrival there, the goods were booked on the bankrupt's account; and the defendant, not knowing that the bankrupt had absconded, unpacked them to see of what they consisted. On the 31st they were claimed by Messieurs Wallers, and on the next day demanded by the assignees; but the defendant, being indemnified by the former, refused to deliver them. The jury found a verdict for the plaintiff[a]. On the motion to set aside this verdict, Lord Alvanley, C. J. said, " undoubtedly there are cases in which packers and wharfingers are to be considered as middle men; but there may always also be a question whether, in the particular case, they are so to be considered or not, which depends upon whether the *transitus* is at an end[b]. In this case, it seems impossible to raise a doubt whether the *transitus* was at an end; for if the bankrupt had no warehouse to receive the goods but that of the packer, the *transitus* never could be at an end if it did not end there. Under all the circumstances of the case, his lordship was clearly of opinion that the consignees were not entitled to consider the defendant in the light of a mere packer, so as to enable them to stop the goods in his custody[c]. Heath, J. observed, that the

[a] Scott *v.* Pettit, 3 B. & P. 469. [b] 3 B. & P. 320. [c] *Id.* 472.

the very expression, "stoppage *in transitu*," *ex vi termini*, implied that there must be a place of ultimate delivery of the goods. If the bankrupt, in that case, had possessed a warehouse of his own, and the packer had merely taken them as a middle man, the consignors might have stopped them. But there being no other place of delivery than the warehouse of the packer, the goods, when arrived there, had come to their last place of delivery, and consequently were no longer liable to the right of stoppage *in transitu*[d]. Rooke, J. said, in all the cases where the consignor had been allowed to stop the goods, in the custody of the packer, there had been a place of ulterior delivery in view. In that instance, there was no place of delivery but the warehouse of the packer. The delivery therefore to the packer, was equivalent to a delivery to the bankrupt himself[e]. Chambre, J. said, he was entirely of the same opinion. If the warehouse of the packer were not to be considered as the place of delivery to the bankrupt in that case, there could be no place of delivery at all; for the bankrupt had no other opportunity of receiving goods, but by the hands of the defendant. In that case, there was no ulterior destination; the *transitus* therefore was at an end[f].

Delivery to a wharfinger, *to be forwarded*, is not sufficient.

The cases have established, that where there is a contract for the sale of goods, and delivery has been made to a middle man, who is merely the vehicle between the buyer and seller, the latter, in case of the insolvency of the former, may stop them, at any time before they have arrived in such a state, as to be in the actual

[d] 3 B. & P. 473. [e] *Id.* [f] *Id.* 473, 4.

actual or constructive possession of the buyer. The only question therefore is, whether the goods are to be considered in the hands of a middle man, or as having been reduced into the possession of the person for whom they were ultimately intended. Where the goods, having been carried as far as they could by water, were delivered to a wharfinger (who was not particularly employed by the vendee, but who paid the freight and charges for the carriage of the goods to the wharf), for the purpose of being forwarded to the consignee, at the place of their ultimate destination; and the consignee, having become bankrupt, refused to take the goods; it was held, that the wharfinger was to be considered as a middle man, and consequently whilst they were in his possession, they were *in transitu*, and might be stopped by the vendor [g]. But this case (which was trover against the wharfinger) was decided against him, on the ground, that his having delivered the goods to the vendee's assignees, contrary to his own express undertaking, was a tortious conversion of them, for which an action of trover might be maintained [h]. In the case of Scott and Pettit [i], Lord Alvanley observed, that the court had held the wharfinger, in the case of Mills and Ball, to be merely a middle man; for though he paid the freight and charges up to the wharf, he was not authorized to meddle with the goods, or impeach the vendor's title to them: he was only one of the hands by which they were to be forwarded to North Tawton, the place of their ultimate destination [j].

In

[g] Mills *v.* Ball, 2 B. & P. 461. [h] *Id.* [i] 3 B. & P. 469. [j] *Id.* 472.

Aliter, if consignee uses the warehouse of wharfinger as his own.

In the case of Richardson and Goss (which turned on the parties having rescinded the contract, before the goods were received by the wharfingers), the court seem to have thought that, because the vendee had been in the habit of using the defendant's wharf as his own warehouse, it must be so considered[k]. Chambre, J. said, if it were necessary to decide whether the *transitus* was at an end, he should strongly be inclined to think that if a man were in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, that the journey would be at an end when they arrive at such warehouse[l]. In the case referred to, it does not appear but that the vendee had a warehouse of his own; though that fact is not expressly disclosed in the report, which only states that Wilson's, the vendee's, goods were *usually* landed at the defendant's wharf. But the observation made by Chambre, J. in the case of Scott and Pettit, is strong to shew, that whether the vendee have a warehouse of his own or not, yet if he use the warehouse of another person as his own, a delivery at that warehouse will have the same effect as if it were his own; for the creditors, probably knowing that he used it so, and that the goods were consigned to him, may have trusted him on that account[m].

Delivery at a sea-port (for transportation) by order of vendees, to await their direc-

Where goods are ordered by traders in London, of manufacturers in the country, to be sent to third persons at a sea-port, for the purpose of being forwarded to other persons abroad, the foreign correspondents of the

[k] 3 B. & P. 120. [l] *Id.* 127. [m] See 3 B. & P. 473, *et vide ante*, 526.

the house in London, according to directions to be received at the sea-port from the London merchants; as between the buyers and sellers of the goods, the right of the former to stop them, as *in transitu*, is at an end, when they come to the possession of the persons at the sea-port[n]. In this case, the goods were furnished by the defendants, Baldwen and another, cotton dealers at Manchester, to the order of the Battiers, traders in London, to be forwarded to Metcalfe and Co. at Hull, for the purpose of being shipped to the correspondents of the Battiers, at Hamburgh. When the goods arrived at Hull, the Metcalfes received orders from the Battiers, when and to whom to ship the goods at Hamburgh. The goods had arrived at Hull, where they waited for the directions of the Battiers as to their shipment. The action was brought by the Battiers' assignees against Baldwen and his partner, who had stopped the goods. Lord Ellenborough said, the goods had so far got to the end of their journey, that they waited for new orders from the purchaser, to communicate to them another substantive destination, without which orders they would remain where they were. Grose, J. dissented on this point. But Lawrence and Le Blanc, Justices, agreed with Lord Ellenborough, that the goods had arrived at their place of ultimate destination, as between the litigating parties; and consequently that there remained no right to stop them *in transitu*[o]. Le Blanc, J. observed, that till the Metcalfes received directions from the Battiers, they did not know where to send the goods:

[n] Dixon *v.* Baldwen, 5 East 175. [o] *Id.* 187, 8.

goods: the warehouse of the Metcalfes at Hull must therefore be considered as that of the Battiers[p].

Delivery on board ship whereof vendee has complete controul.

It was once supposed to be a general rule, that the delivery of goods by the vendors on board a ship chartered by the vendee, was a delivery to the vendee himself, so as to preclude the vendor's right of stoppage *in transitu*. This opinion was entertained upon the authority of a case frequently cited by the name of Fowler and M'Taggart (but the more proper name of which is Fowler against Kymer and others), tried before Mr. Justice Grose, at Bristol, and which afterwards came before the court on a motion for a new trial[q]. But that case only appears to have determined, that if the vendee have the entire disposition of the ship, and complete controul over her, under a contract of hiring for a term, a delivery on board is the same as a delivery to the vendee. That was trover by the assignees of a bankrupt, to recover the value of a certain quantity of tobacco, which the defendants had shipped by order of the bankrupts on board the Minerva, bound from London for Naples and Alexandria; which ship was chartered to the bankrupts for three years from July, 1792. The tobacco was to be paid for by a bill at three months, drawn by the defendants on the bankrupts, and accepted by them. The goods were shipped on the 4th of February, 1793, for which the mate's receipt was given, and an invoice thereof was made out by the defendants in the names of the bankrupts. The vessel was detained by contrary winds

[p] Dixon v. Baldwen, 5 East 188; and see 3 B. & P. 320. 469.
[q] Fowler v. Kymer, K. B. M. 38 *Geo.* 3. cited 7 T. R. 442.

winds at Portsmouth, during which time the bankrupts, having stopped payment, about the 11th of March, 1793, the defendants procured bills of lading to be signed by the captain to them, and obtained possession of the tobacco in September, 1794, and procured it to be re-landed, and afterwards disposed of for their benefit[r]. But (as Mr. Justice Lawrence, in Bohtlinck and Inglis, observed), the bankrupts in that case, were in possession of the ship for a term of three years. They found stock and provisions for the ship, and paid the master, and were during that time to have the entire disposition of the ship, and the complete controul over her. She had been one voyage to Alexandria, and the goods were put on board her, to carry them on another voyage to that place; not for the purpose of conveying them from the plaintiffs to the bankrupts, but that they might be sent by the bankrupts upon a mercantile adventure, for which they had bought them. The delivery was therefore complete[s]. This case was however afterwards cited and relied upon as an authority to prove the general position, that a delivery of goods by the vendors, on board a ship chartered by the vendee, was a delivery to the vendee himself. The question seems first to have arisen in a *nisi prius* case before Lord Kenyon, two years after that of Kymer and M'Taggart, upon the same bankruptcy as was in question in Bohtlinck and Inglis. Lord Kenyon, in that *nisi prius* case, appears to have held, that a delivery on board a ship chartered by the consignee, was a complete

[r] 1 East 522. [s] 3 East 396.

plete delivery to him, so as to preclude the consignor's right of stoppage *in transitu*. It is remarkable, that although that case afterwards came before the court of King's Bench on a motion for a new trial, (and which was refused) on another ground, the point in question does not seem to have been mentioned[t]. The point afterwards arose in the case of Inglis and Usherwood, where the judges seem to have considered it as a general rule of law, that such a delivery did preclude the right of stoppage; but it was not necessary to decide upon it as such in that case, which (as will be seen presently) was determined upon a collateral ground depending on the law of Russia.

But if after delivery on board ship, the owner, under sanction of the law of Russia, gets the captain to sign bills of lading to his order, that is a sufficient stoppage.

There, the delivery was made on board a ship in Russia; by a law of which country, the owner of goods, in case of the bankruptcy of the vendee, may sue out process to retake his goods on board ship, and retain them till payment[u]: and the owners, hearing of the insolvency of the vendée, applied to the captain, on board of whose ship the goods had been delivered, to sign the bills of lading to their order, which he complied with, without the necessity of suing out process: and it was held, that supposing that the delivery on board the ship was a delivery to the vendee, yet that this was a substantial compliance with such law, which compelled the captain, on his arrival here, to deliver the goods to the order of the vendors, and not to the assignees of the vendée, who had become bankrupt[v]. The Russian law alluded to was one of the mercantile navigation laws

[t] Bohtlinck *v.* Sneider, 3 Esp. 59, 60. [u] *Ante*, 430. [v] Inglis *v.* Usherwood, 1 East 515.

laws of Russia, published the 25th of June, 1781, sect. 138, whereby "it is ordered, that if, in case of "unpaid debts or bankruptcies, any body has reason "to suspect that the debtor or bankrupt has any thought "of making the creditor lose, and therefore loadeth "on board of ship or vessel, goods or cargo; in such "a case the creditor is to give notice in town to "the head judge of the court, (in districts, to the "chief), that the ship or vessel, or goods, or the whole "cargo, should be retained time enough until the full "payment is made to whom due [w]." There was a commentary upon this law, stating that if the seller or shipper, in case of bankruptcies, can identify that the merchandize belonging to him is here in ships, warehouses, or whatever they may be, in such a case the goods must be given to the sellers or shippers, being their property, and cannot be brought in concurs [x]. And it was held by the whole court, that by the Russian ordinance, the consignors, under the circumstances, had a right to re-possess themselves of their goods; and they did so in effect, not indeed by actually taking them out of the ship on board of which they were laden, or by instituting legal process for the recovery of them; but (having a right so to do, which it became unnecessary to exert, because it was acknowledged and submitted to by the captain, in whose possession the property was) by having imposed terms upon him, that he should sign bills of lading to their order, which would give them the right to the goods on their arrival; upon compliance with which, they suffered the cargo to proceed to the place of its destination,

[w] Inglis v. Usherwood, 1 East 520, 1. [x] *Id.* 521, a. *Ante*, 431.

tion, subject to that right. Lord Kenyon observed, that the law of Russia was a very equitable law; he was far from desirous of limiting its operation; he thought that the consignors had substantially availed themselves of it; and the defendant, by delivering the goods to their order, had done no more than he was bound to do[y]. Grose and Lawrence, Justices, said, that by the law of Russia, the goods were, in effect, kept *in transitu*. Le Blanc, J. said, if the captain had refused to sign the bills of lading of the goods to the order of the owners, it would then have been time enough for them to have used the compulsory process of the law; but that was unnecessary to be resorted to, by the captain's compliance with their demand. The captain signed bills of lading to their order, which was, in effect, a delivery to the owners[z]. Indeed, it seems that this circumstance, independently of the Russian ordinance, would have warranted the decision of the court. For that, of itself, seems to have been a complete stoppage *in transitu*, if it did not amount to an actual taking possession of the goods by the consignor; which, it is clear, was unnecessary, to enforce the right of stoppage, a mere countermand of the delivery being sufficient for that purpose.

No difference between a general, and a chartered ship.

The question, whether the delivery on board a chartered ship was a delivery to the vendee, however, at last came directly before the court, when it was decided that there is no difference between a general ship and one chartered by the consignee, where the latter has no controul over the ship, but has merely contracted with

[y] Inglis v. Usherwood, 1 East 523, 4. [z] *Id.* 525.

with the master to employ his ship in fetching goods for him. In an action of trover brought by the plaintiffs, merchants at Petersburgh in Russia, against the defendants, the assignees of Crane, a bankrupt, to recover the value of one hundred casks of tallow[a], the circumstances of the case, as applicable to this point, were shortly these: Crane, the bankrupt, a merchant in London, had entered into an agreement with Usherwood, the master of a ship, for her going to Petersburgh, and there receiving from the factors of the bankrupt a quantity of merchandize of various descriptions, and proceeding from thence to London, in consideration of certain freight to be paid *per* ton, half on unloading, and the remainder in three months. The master was to sign the usual bills of lading; and Crane was fully to load the ship. In consequence of this agreement, the ship sailed to Petersburgh, and was loaded by Bohtlinck and Co. on the account and risk of Crane; and one part of the bill of lading, directing the goods to be delivered to Crane and Co. or his assigns, was sent to him; the other part, in consequence of the plaintiff's having obtained information of Crane's insolvency, was afterwards sent to Mr. Schneider, their agent, with directions not to deliver that part to Crane, unless he gave sufficient security for the amount of the goods. The plaintiffs, at the same time that they sent this part of the bill of lading to Schneider, informed Crane of their having so done, and required him, in case he did not give security, to deliver to Schneider the bill of lading that had been sent to him, Crane. In fact, Crane had become a bankrupt before the

[a] Bohtlinck v. Inglis, 3 East 393.

the goods were delivered on board the ship in Russia, but after their purchase; and on the arrival of the ship in the Thames, Schneider demanded the goods of the master, who refused to deliver them to him, and delivered them to the defendants[b]. Under these circumstances, the qaestion was, whether the possession of the master was like that of a carrier, or was equivalent to the actual possession of the bankrupt.

Judgment in Bohtlinck *v.* Inglis.

Mr. Justice Lawrence, in delivering the judgment of the court, observed, that it appeared that Usherwood, the master, having contracted with the bankrupt to proceed to Petersburgh, and to bring in his ship a cargo of goods, which Crane engaged should amount to the tonnage of the ship, the contract in that case did not differ from a similar contract entered into by the consignor, according to the directions of the consignee at the loading port, for the conveyance of the goods from him to the vendee: in which case, it would hardly be contended that a delivery by the consignor to the master of the ship, for the purpose of carriage, would be such a delivery to the vendee as to prevent the right of stoppage *in transitu*. In each case, the freight would be payable by the consignee: the ship would be hired by him; and there would be no difference, except that in the one case the ship, in consequence of the agreement, would go from England to fetch the cargo; in the other, the vessel would bring it immediately from the loading port: in both cases, the contract is with the master for the carriage of goods from one place to another; and until their arrival at the port of destination, and delivery to the consignee, *they are in their passage or transitus*

[b] 3 East 394, 5.

transitus from the consignor to the consignee. If a man contract with the owner of a general ship to take goods, which are equal to half the tonnage of the ship, and the master complete the loading of his ship with the goods of others, there would be no question but that there might be such stoppage: and surely it will not be said that the right of stoppage depends on the quantity of goods consigned[c]. The facts of the case of Fowler and Kymer (the learned judge said) differed widely from that of Bohtlinck and Inglis, where Crane had no controul over the ship, but had merely contracted with the master to employ his ship in fetching goods for him. And the case of Stokes and La Riviere and Lawley[d] was much stronger than the latter case. The case of Inglis and Usherwood[e] did not decide, as was supposed in the argument, that the transit was complete on the delivery of the goods on board the ship; for it was determined on the ground, that the Russian laws authorized the taking of the goods, even if the delivery had been complete. In that case, Lord Kenyon says, "giving the plaintiff the full benefit of the "argument, that the delivery of the goods on board a "chartered ship was a delivery to the bankrupt, still "the Russian ordinance takes it out of the rule." Mr. Justice Grose, indeed, uses more general expressions, from whence it may be inferred, that he considered the ship as one, a delivery on board of which was a delivery to the defendant: but that is not the true way in which his opinion is to be understood. The case of Fowler and Kymer and M'Taggart had been cited, in reference to which he was speaking: and he is not to be taken

[c] 3 East 395, 6. [d] *Id.* 397, 8. [e] 1 East 515.

taken as laying down any proposition beyond what was established by that case. Supposing the delivery to be similar to that in Fowler and Kymer, he took the same ground that Lord Kenyon did, and decided, that notwithstanding such delivery, the goods, by the law of Russia, were *in transitu*. In the account of what Mr. Justice Lawrence is stated to have said, he appears to have recognized the authority of Fowler and Kymer to the extent that case goes; namely, that if one purchase goods here to be sent abroad, and they are delivered on board a chartered ship in a port of this kingdom, such delivery is in effect a delivery to the vendee: and he is reported to have given it as his opinion, that if the delivery in the case then before the court were a delivery which in this country would have been a delivery to the vendee, still, according to the laws of Russia, the goods might be stopped. But this opinion he utterly disclaimed. And Mr. Justice Le Blanc's opinion went entirely on the laws of Russia; without inquiring how far the case then before the court was distinguishable from those cited in any other respect [f].

Delivery into king's stores.

When goods are consigned, but (the duties not being paid) they are lodged in the king's stores, the consignor may stop them *in transitu*, if he claims them before they are actually sold for the payment of the duties; or if sold, he is entitled to the proceeds. An action for money had and received was brought by the assignees of Leyland and Cragg, to recover the value of a quantity of wine which had been consigned to the bankrupts,

[f] 1 East 398, 9.

rupts, who then carried on the business of wine-merchants; and had accepted a bill for the price. The bill of lading had been sent to one Thompson, resident here, and who was partner with Perry, Friend and Nassau, the consignors of the goods. It appeared that by the excise laws, twenty days are allowed after the ship arrives to pay the duty on wines, during which time the wines remain on board the ship; and if the duty be not paid within that time, they are removed into the king's cellars for three months, when the owners may have them on paying the duty, warehouse-room, &c.; but if those charges be not paid within the three months the wines are sold, and, after deducting the charges, the overplus is paid over to the owners. Leyland and Cragg became bankrupts after the ship's arrival. Before the twenty days expired, the duties not being paid, the wines were, on the 28th day of July 1796, removed into the king's cellars. The agent for the consignors, the day before the expiration of the three months, applied for and endeavoured to get possession of them, but did not succeed; and they were sold on the 23d of February, 1797, at the king's stores, by public sale. The wines produced £109, after all deductions, which was paid over to the broker, who was defendant in the action. Lord Kenyon, C. J. was of opinion that the plaintiffs were not entitled to recover, for the bankrupts had no title to the actual possession of the goods till the duties were paid, until which time they were *quasi in custodiâ legis*, and before the sale, the agent for the consignors claimed, and endeavoured to get possession of them, which was a sufficient stoppage *in transitu* to secure the rights of the consignors. The plaintiff asked for a case, which

was

was granted; but it seems to have been never afterwards moved[g]. In a subsequent case, of an action of *assumpsit*, to recover freight and primage of tobacco, consigned from Norfolk in Virginia to Liverpool; the tobacco having arrived in a damaged state, was deposited in the king's warehouse pursuant to the statute; and afterwards, with the knowledge of the captain, was entered at the custom-house, by an agent of the shippers and the consignee of the goods, in his own name, to avoid seizure; Lord Kenyon, C. J. said, he was not satisfied that the captain parted with his lien upon the tobacco for his freight, by the delivery of it into the king's warehouse; it was deposited there in compliance with the requisitions of parliament, and was still disposable according to the just claims of all parties[h]. Lawrence, J. said, if the captain did not like to give trust for the amount of the freight, he should either have entered the tobacco in his own name, or at least have given notice to the defendant that he would not part with his lien without the pledge of his security[i]. Le Blanc, J. said, the captain was not bound to have parted with the goods till his lien was satisfied; but because he did not think it worth his while to keep them, it was no reason for calling on the defendants for payment of the freight[j].

[g] Northey *v.* Field, 1 Esp. Rep. 613. [h] 1 East 512. [i] *Id.* 514. [j] *Id.*

CHAPTER

CHAPTER IV.



OF RESCINDING THE CONTRACT, IN CASE OF BANKRUPTCY OR INSOLVENCY.

Contents of chapter.

ALTHOUGH the doctrine of rescinding the contract is intimately connected with that of stoppage *in transitu*[a], yet it is clearly distinguishable from it, inasmuch as stoppage *in transitu* seldom does, and need not at any time take place, with the consent of the vendee; whereas the contract cannot be rescinded without his consent, as well as that of the vendor. There is another clear difference between the two. Stoppage *in transitu*, *ex vi termini*, supposes that the delivery of the goods is stopped or prevented; but rescinding of the contract may, and generally does, take place after the delivery of the goods. Both stoppage *in transitu*, and rescinding of the contract (as it is here meant to be treated) happen in the event of the vendee's insolvency or bankruptcy; though the contract may, of course, be rescinded or put an end to by mutual consent, at any time or under any circumstances. We shall in this chapter consider, first, what amounts

[a] *Ante*, 516, 17.

amounts to a rescinding of the contract, so far as the vendor's assent to it is concerned; and the consequences of its being rescinded, to the wharfinger, or other person in whose custody the goods may be lodged; and secondly, where the consignee or vendee may, or may not, in the event of his insolvency or bankruptcy, give up the goods and rescind the contract. One reason why this method has been preferred to any other is, because it admits of the consideration of the several cases on the subject, in the order in which they have occurred and been determined. The case of Atkyn and Barwick is the first in that order, and as it is a leading case on the subject, rather intricate in its facts, and obscure as to the principles of its decision; frequently quoted and commented upon, and as frequently doubted, but never over-ruled; it will require a greater particularity and fullness of statement, together with the comments which have from time to time been made upon it.

Delivery of goods to a third person for use of vendors, in satisfaction of precedent debt, vests the absolute property in them, before their assent.

If merchants in London, being creditors of traders in the country, for goods sold and delivered, on further orders, send other goods, and give credit for them in their books; and the traders in the country becoming insolvent, without the knowledge of the merchants, send the goods to a third person for their use, and afterwards become bankrupts, their assignees cannot maintain trover against the merchants for the goods so sent. For the precedent debt due from the traders to the merchants for the goods previously delivered, is a sufficient consideration to take away any power in the former, or their assignees, to countermand the delivery; and although the merchants were at liberty to dissent from

from it, yet their assent is not necessary; for the absolute property passes by the delivery, subject to their disagreement; nor can a disagreement to the delivery be intended, it being for their benefit. And for that reason, if an assent were necessary, it may be presumed immediately on the delivery, and before the bankruptcy [b].

Atkin v. Barwick.

The case above cited was this: Barwick and Co., merchants in London, being creditors of Cripps and Co. traders in Cornwall, on the 7th of April, by their orders, sent them the goods in question, and debited them in their books. On the 18th of May, Cripps and Co., without the knowledge of the defendants, sent the goods to a Mr. Penhallow, at Penryn, for the use of the defendants; and, on the 4th of June, became bankrupts. On the 6th of that month, they wrote a letter to Barwick and Co. informing them of their situation, and that they had so delivered the goods to Penhallow. On the 9th, the commission and assignment took place, and it was not till the 13th that Barwick and Co. received the letter; when they immediately signified their assent to take back the goods, which they did. In consequence of this, the assignees of Cripps and Co. brought an action of trover against them for the value of the goods; and it was held not to be maintainable. The only question was, whether by the delivery to Penhallow, without more, the property was altered; for if that delivery was countermandable, then the act of bankruptcy, intervening before any assent of the defendants, prevented the

[b] Atkin v. Barwick, 1 Str. 165.

the property from vesting in them. And it was held, that, under the circumstances, there appeared a sufficient consideration to toll a subsequent power of countermanding the delivery, namely, the pre-existing debt. It is true, that the bare delivery would not extinguish it, because Barwick and Co. had a power to dissent; but yet, according to Butler and Baker's case[c], the absolute property passed, subject to a disagreement by them. The contract did not stand open till agreement, but was complete unless an actual disagreement took place. The consequence was, that the delivery to Penhallow to the use of the defendants, being before the act of bankruptcy, and founded upon a good consideration, transferred the absolute property to them, they never having disagreed. All the cases go upon the distinction, where the delivery is with, and without consideration[d]. If with consideration, and the delivery is of money, debt lies[e]: if of goods, trover[f]. The precedent debt was a sufficient consideration, and the property vested in Barwick and Co. on the delivery, before notice; because it being for their benefit, a disagreement shall not be presumed. Property, by our law, may be divested without an actual delivery; as, by the sale of a horse in a stable; though it is otherwise by the civil law. A general bailment alters no property, but the delivery in question was not such. It could not be taken for a re-sale, for defect of contract; but it was properly a delivery in satisfaction. It is most reasonable to treat it as a discharge of the debt, and not as a gift; for a man is just before he is kind. Therefore

[c] 3 Rep. 25. [d] Dy. 49. [e] Yelv. 23, 24. Cro. Jac. 687. Rast. 159. [f] 1 Buls. 68.

Therefore it shall be intended to have been in satisfaction of the precedent debt; and an acceptance, if necessary, might be presumed till the contrary appeared [g].

Lord Mansfield's observations on the case of Atkin and Barwick.

In Harman and Fisher, Lord Mansfield observed, that with respect to the case of Atkin and Barwick, the judgment seemed to be right, but the reasons wrong. The true ground was, that the traders very honestly refused to accept the goods, and returned them [h]. But it does not appear from the report of the case, that there was any connection or privity whatever between the sellers and Penhallow, to whom the goods were delivered by the traders for the sellers' use, before the bankruptcy; and it appears that the sellers did not know of their being delivered to Penhallow, till the receipt of the buyers' letter informing them of that fact, and which did not come to hand till some days after the bankruptcy. So that there seems to be considerable difficulty in putting the case upon the delivery to Penhallow, without any assent express or implied on the part of the sellers. The buyers could not of themselves rescind the contract of sale, executed as it was, by a complete delivery, without the assent of the sellers; who might have had a good opinion of the state of the buyers' affairs, and insisted on their keeping the goods; though it seems neither unreasonable nor difficult to presume, in furtherance of the obvious justice of the case, and intention of the parties, that the re-delivery of the goods to

[g] 1 Str. 166, 7. [h] Cowp. 125.

to Penhallow's use was in satisfaction of the previous debt from the buyers, to the sellers, for the goods in question, or those previously delivered.

Adoption thereof by Lord Kenyon, &c.

In Salte and Field, the judges seem to have considered that the case of Atkin and Barwick, proceeded upon the ground of a rescinding of the contract. Lord Kenyon said, that the agreement of the parties to rescind the contract put an end to the sale, as if it had never taken place[i]. Buller, J. also observed, that the point there contended for was, that there was no consent by the sellers to rescind the contract, but the court said they would presume it, because it was for the interest of the parties[j]. In Neate and Ball, Lord Kenyon, (apparently with reluctance,) observed of the case of Atkin and Barwick, that he had never heard it quoted without some comment upon the law of it. Each gentleman at the bar, (he said,) found fault with it in his turn. In his opinion, Lord Mansfield had extracted the true ground on which the judgment, if it did not proceed, ought to have proceeded; namely, that the traders, finding themselves in a failing condition, very honestly did not accept the goods, but returned them. And if the goods were not accepted, the judgment was right. Cases are to be resorted to for the sake of the principle on which they were decided[k]. I will not say, (said his lordship,) that the case of Atkin and Barwick was wrongly decided; I leave it to others to consider that point: but Lord Mansfield has given a ground on which the judges there went, or ought to have gone, in deciding it[l]. Grose, J. concurred with Lord Kenyon in thinking, that the only ground to support the judgment in

[i] 5 T. R. 214. [j] *Id.* [k] 2 East 124. [l] *Id.* 125, 6.

in Atkin and Barwick was, what Lord Mansfield had stated it to be in the subsequent case of Harman and Fisher, namely, that there had been no acceptance of the goods by the traders [m].

Qu. If Atkin and Barwick would be considered as law at this day?

Indeed it is singular, that a case should have been so often cited with disapprobation, without being over-ruled, and that different judges should have supposed it to have proceeded upon different grounds; though the great majority of them seems to have thought, that the true ground of the decision was that mentioned by Lord Mansfield, that the goods had never been accepted by the trader [n]. In Richardson and Goss, Mr. J. Chambre observed, that the case of Atkin and Barwick had stood very near a century; but though it had been much commented upon, and its authority in the main had been preserved, it must be confessed, that there are some very peculiar circumstances in that case. Seventeen days intervened after the goods had been sent out of the possession of the consignees, before any notice was given to the consignors of their intention not to accept them; and it does not appear that the person to whom they were sent had any connection with the consignors: perhaps therefore, if a case precisely similar to Atkin and Barwick were now to arise, it would not receive the same decision. A new distinction has since arisen, respecting preference given to one creditor over the rest, in contemplation of bankruptcy; and perhaps that distinction would have been sufficient to

[m] 2 East 126. [n] *Per* Lord Alvanley, in Richardson *v.* Goss, 3 B. & P. 124.

to set aside the transaction in Atkin and Barwick. But the objections do not rest here; for when advice was given to the consignors that the consignees had sent away the goods, the bankruptcy had taken place. Under these circumstances, it might be difficult now to support the case, as it was then decided. It is very remarkable, that the case has been mentioned upon various occasions, when it has constantly been found fault with; and yet the judges have never particularly stated the parts with which they disagreed, but have always confirmed the case upon the whole, and held the decision to have been right. The main point was, that the court thought proper to presume an assent on the part of the consignors; and certainly it was necessary that they should do so, for the consignors had no opportunity of expressing their assent until nineteen days after the goods were sent away, and two days after the act of bankruptcy had taken place [o].

The sellers' assent, to the buyer's offer to take back the goods, re-vests the property in them.

It is clear, that when the sellers of the goods actually assent to the buyer's offer to let them take back their goods, the property is thereby re-vested in them, so as to avoid the effect of foreign attachments, subsequently taken out against them according to the custom of London, by the vendee's other creditors. One Dewhurst had a house of trade in London, and another house at New York, where he resided. Goods purchased by the intervention of his clerk, were delivered at the house of trade in London, and sent to a packer to be shipped for Dewhurst at New York. But before the sale, Dewhurst at New York wrote a letter

[o] *Per* Chambre, J. in Richardson *v.* Goss, 3 B. & P. 127.

letter to the clerk (which was not received in London till after the delivery of the goods) informing him of his ruin; and directing him that if he had purchased any goods on his account, he should let the sellers have them back. The sellers of the goods in question, on learning this, assented to take them back. But attachments having issued out of the Lord Mayor's Court, the packer refused to deliver them on demand; upon which the sellers brought an action of trover against him for their value. A commission of bankrupt then issued against Dewhurst. And it was held that the action was maintainable[p]; for although the property in the goods was apparently divested out of the plaintiffs at the time of the sale, yet afterwards, when the facts were disclosed, it was in the power of the sellers to put an end to the contract, as if it had never existed. It was competent to the principal to disavow, or rather renounce, the contract made by his agent, if the vendors chose to accede to it; though the proposition made by him, and which was dictated by common honesty, might have been refused by them, if they had chosen. But they agreed to it; and by the mutual agreement of the parties, the contract of sale was rescinded, and the property re-vested in the plaintiffs; therefore the creditors of Dewhurst had no right to attach it in the defendant's hands. If Dewhurst had died before the purchase, the contract must have been put an end to[q]. A question was put in the argument, whether acts done by an agent before he knows of the revocation of his power, are good? And

[p] Salte v. Field, 5 T. R. 211. [q] *Per* Lord Kenyon, C. J. and Ashhurst, J. *Id.* 213, 14.

And it seems that the principal, in such case, could not avoid the acts of his agent, if done *bonâ fide* to his disadvantage; but he might consent to avoid those which are for his benefit[r].

If vendee, having become bankrupt, decline to take the goods, the wharfinger cannot (after a contrary promise) deliver them to the assignees.

If the vendee, having committed an act of bankruptcy, informs the vendor of his intention not to take the goods; and the wharfinger, in whose custody they are, upon application by the vendor and tender of the charges, promises not to deliver them out of his custody till he is certain of a safe delivery, but afterwards deliver them to the vendee's assignees, contrary to his undertaking; it is a conversion of them, in point of law, for which an action of trover may be maintained by the vendor[s]. The case before the court was shortly this. Gard, being a trader at North Tawton, gave orders to the plaintiffs to send the goods in question from London, to him at Exeter to be forwarded to North Tawton, without directing that they should be sent by any particular ship. They were accordingly shipped, arrived at Exeter, and were put into the hands of a wharfinger to be forwarded to their journey's end. In the books of the wharfinger, they were put to the account of Gard, as the person to whom they were directed, and he was considered as the wharfinger's pay-master. In this state of things, a letter was received from Gard by the plaintiffs, intimating to them "that his situation was such that he would not receive the goods, and that they might take them back again, if they thought

[r] *Per* Buller, J. in Salte *v.* Field, 5 T. R. 214, 15. [s] Mills *v.* Ball, 2 B. & P. 457.

thought proper." The plaintiffs, immediately on the receipt of this letter, forbade the wharfinger to deliver the goods according to the direction, who promised not to deliver them until he could do so with safety; notwithstanding which he afterwards delivered them to the assignees of Gard. One question was, whether the goods, in the hands of the wharfinger, were in such a situation that the vendors could stop them; and it was held that they might. But the principal question was, admitting that the plaintiffs had a right to retain the goods had they got them into their own possession, whether they had a right of action to recover them out of the hands of the wharfinger? Upon this question Lord Alvanley, C. J. said, he was very far from wishing it to be understood, that an action may be brought by the person entitled to stop the goods, against a carrier, who, after notice to retain, delivers them to the person to whom they were originally consigned: such a rule would be highly oppressive to carriers. A carrier knows nothing of the vendor. In the case of a conveyance by ship, the master signs a bill of lading by which he engages to deliver the goods to the consignee or his order: and if he deliver them accordingly, it can hardly be supposed that he thereby subjects himself to an action, because the vendor has a right to stop the goods *in transitu*[1]. In the present case however, full notice was given to the wharfinger by the consignors, and no demand was made on the part of the original consignee. The consignors by letter demanded possession; and the wharfinger admitted himself to be in

[1] See Fearon v. Bowers, 1 H. B. 364. *Sed vide ante*, 425.

in the nature of a stake-holder, bound to deliver according to the right. Without determining, therefore, whether the wharfinger would have been liable without notice, or even after notice, supposing no undertaking to have been made by him, his lordship thought it clear that the defendant having undertaken "not to deliver the goods out of his custody till he was certain of a safe delivery," was answerable to the plaintiffs[t]. Heath and Rooke, Justices, were of the same opinion. Rooke, J. though he did not give an express opinion on the point, seemed to think that an action might be maintained against a carrier upon bare notice not to deliver[u]. Chambre, J. said, in the case before the court, there could be no doubt of a conversion having taken place. Cases of difficulty (he observed) may indeed arise; as, if a carrier, upon reasonable doubt, should refuse to deliver up the goods without further authority, or until the circumstances of the case are ascertained[v]; for a demand and refusal do not always constitute a conversion[w]. But the defendant's delivering the goods, contrary to his own undertaking, was an actual conversion.

What damages he is liable to, if he so deliver them.

In this case, the defendant having delivered the goods to the assignees, they sold them for £103. 7*s*., and the charges amounted to £3. 19*s*. Whereupon a question arose, as to what damages the plaintiffs were entitled to recover; whether £111. 7*s*. 3*d*., the value of the goods; £103. 7*s*., the sum for which they were sold;

[t] 2 B. & P. 462. [u] *Ante*, 436. [v] See 2 Buls. 312, *per* Coke, C. J. Solomons *v*. Dawes, 1 Esp. Rep. 83. Green *v*. Dunn, 3 Camp. 215. [w] 2 B. & P. 464, b.

sold; or £99. 17*s.*, the sum for which they were sold, after deducting the charges? Upon this question, the court expressed themselves clearly of opinion that the plaintiffs were only entitled to the smaller sum [x]; and accordingly ordered the verdict to be entered for the £99. 17*s.* only [y].

If contract be rescinded before arrival, wharfinger cannot detain goods for general balance due from consignee.

If goods are consigned to a particular wharf, but the contract for the consignment is put an end to before the goods are received at the wharf, in that case, they do not come into the hands of the wharfinger as the goods of the consignee, but as the goods of the consignor; and therefore the latter will be entitled to recover them, on tendering the freight and charges for those particular goods, he not being subject to any lien for the general balance of the consignee's account with the wharfinger [z]. Common justice requires this. On the arrival of the goods, the wharfinger is put to some trouble and expence, for which he has a special lien against the proprietor of the goods; and if he have a general balance due from him, he may set up a general lien for that against the proprietor. But the lien, whether general or special, must be against the proprietor [a]. Nor can the omission of the consignee to countermand an order, which he had given to the wharfinger to receive the goods in question, previous to the rescinding of the contract, give the wharfinger a lien upon the goods for the general balance due from the consignee [b]. In the case cited, the goods were shipped by the plaintiff at Newcastle at board the Formosa,

[x] 2 B. & P. 459. [y] *Id.* 464. [z] Richardson *v.* Goss, 3 B. & P. 123. 125. [a] *Per* Chambre, J. *id.* 128. [b] *Id.* 119.

mosa, for one Wilson in London. On the 22d of May, Wilson had directed the defendant (a wharfinger, at whose wharf goods were usually landed for him, and kept till sent for) to receive these goods. But on the 1st of June, Wilson sent the plaintiff a letter, informing him, that on account of the embarrassed state of his circumstances, he should not apply for them; in answer to which, the plaintiff, on the 4th of June, wrote to Wilson, saying, if he found him an honest man, he should have every indulgence from him; but not mentioning the goods in question. On that day, the goods arrived at the defendant's wharf; and he, being ignorant of what had passed between the plaintiff and Wilson, paid the freight and charges. On the 7th, the plaintiff arrived in London, and demanded the goods of the defendant, tendering him the freight, &c.; but the defendant claimed a lien upon them for a general balance due to him from Wilson. Whereupon the consignor of the goods brought trover against the wharfinger; which was held to be maintainable. No question arose between the assignees of Wilson and the plaintiff, respecting the intervention of any act of bankruptcy: and it was therefore held, clearly competent to Wilson to rescind the contract by relation to the 1st of June, provided the plaintiff would permit him to do so. And the plaintiff's answer to his letter, coupled with his subsequent conduct, was held sufficient assent, or evidence of assent, for that purpose; it being for his benefit to put an end to the contract. It was therefore held, that Wilson's neglect to inform the wharfinger of the letter of the 1st of June, (which, if wilful, would have amounted to a fraud in him), would yet not affect the plaintiff's right, although, as between the

the defendant and Wilson, if the former had received the goods on his account, and as belonging to him, the defendant would have had a right of lien for his general balance[c].

The case differed from a case of bankruptcy; where, if any act of bankruptcy intervene between the offer to rescind and assent to it, the assent comes too late to prevent the operation of the act of bankruptcy. There was no fraud or suspicion of fraud in the case. There does not appear to have been any occasion to enter into the question of stoppage *in transitu;* the only question being, whether the contract was rescinded before the goods got into the possession of the defendant. Wilson (the consignee of the goods) had acted very honestly in relinquishing the contract. And the plaintiff's claim was paramount to that of any person claiming under Wilson. Nor is it possible, unless bound by authority, to assent to the doctrine, that these general liens are to affect the rights of third persons, not claiming under those from whom the right of lien is derived[d]. There was not much weight in the argument, that the transaction was a fraud on the wharfinger; for before fraud can be committed there must be some right. Now the wharfinger had a mere naked authority; and any disposition made by the person who gave such authority, must put an end to it.[e]. It seems, that the case could not have rested upon the doctrine of stoppage *in transitu*, as the *transitus* was at an end when the goods arrived at the warehouse[f].

Observations on the foregoing case.

In

[c] Richardson *v.* Goss, 3 B. & P. 119. [d] *Id.* 125, *ante*, 195. [e] *Id.* 128. [f] *Id.* 127, *sed qu?* *Vide ante*, 523, &c.

Of sending goods directed by mistake.

In the case of Richardson and Goss, Lord Alvanley put this case: If a wharfinger have a general authority to receive all goods for A. B., and goods come to his wharf directed for A. B. by mistake, it is quite clear (said his lordship) that the real owner of the goods could not take them away, without paying the charges incident to those particular goods; but it is equally clear, that the wharfinger could not set up a lien upon them, for a general balance due from A. B. to him[g]. It may, it seems, be inferrred from the case of Richardson and Goss, that in the above supposed case, if A. B. were bankrupt or insolvent, the consignor might get his goods back again, without any stoppage *in transitu*, on paying or tendering the wharfage for those particular goods.

Where consignee may give up goods: though in state of impending bankruptcy.

Although an insolvent cannot give a voluntary and undue preference, in contemplation of an act of bankruptcy, yet it is competent for the consignee, after he becomes insolvent, and before he commits an act of bankruptcy, to agree *bonâ fide* to give up goods consigned to him. And the circumstances of the bankrupt's having called a meeting of his creditors, and taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, are evidence for the jury to find that they were given up *bonâ fide*, and not from any motive of voluntary

[g] 3 B. & P. 123.

tary and undue preference; though the bankrupts were in a situation of impending bankruptcy, at the time of giving up the goods; the consignors at that time holding possession of them, under a claim of right to stop them *in transitu*[h]. In the case cited, it appears that at the time when the defendants (the vendors of the goods) gave notice to the persons in whose custody they were, to stop them, they had also applied to the bankrupts, to order them to be delivered up. The bankrupts, in the mean time, called a meeting of their creditors in London, and a case was laid before counsel concerning their right to restore the goods to the defendants; the result of which meeting and opinion, as stated in a letter of the 29th of July, from the bankrupts to the defendants, was, that the goods in question should be given up; and in another letter, they observed that they conceived that the amount of the defendants' claim was as it had been stated to them, after the deduction of the goods stopped. After this, when the bankruptcy happened, the assignees demanded the goods of the defendants. The questions were, whether the bankrupts were in a condition to rescind the contract? and if so, whether they had sufficiently rescinded it before their bankruptcy? Lord Ellenborough left it to the jury, whether or not the consent of the bankrupts to the rescinding of the contract, and returning the goods before the act of bankruptcy, was given *bonâ fide*, and without any intention of a voluntary or undue preference; which he inclined to think it was, it being after legal advice taken, and upon a conference with their creditors, at a public meeting. And the jury found a verdict for the defendants, which was approved of by the court, on a motion for a new trial.

Lord

[h] Dixon *v.* Baldwin, 5 East 175.

Judgment in Dixon *v.* Baldwin.

His lordship then retained the opinion he had intimated at the trial, that the bankrupts were competent to rescind, and had in fact rescinded, the contract for the sale of these goods. The circumstances of deliberation, consent of creditors, advice of counsel, and the publicity which attended the whole of the measure (he said) exempted it from being properly considered as a fraudulent preference in contemplation of bankruptcy. That the parties must have considered themselves in a state of insolvency and impending bankruptcy at the time, could not be doubted; but until an act of bankruptcy, the *jus disponendi* over goods remains by law with the trader, unless he exercises it by way of a voluntary and fraudulent preference of a particular creditor, in contemplation of bankruptcy. But here the goods were given up, if not from a threat of litigation, at least under an idea of the right being probably adverse to the claim of the bankrupts and their creditors. And voluntary favour towards the defendants, did not operate as any inducement with the bankrupts, to recede from their rights on this occasion. The question, whether, under all the circumstances, they acted *bonâ fide* in giving up the goods, or from a motive of voluntary and undue preference to the defendants, was left to the jury, who by their verdict had affirmed that the bankrupts acted *bonâ fide*, and had negatived any voluntary preference [i]. Grose, J. thought, on the second point, that the question had been properly left to the jury, who had found that this was not a voluntary preference [j]. Lawrence, J. said, the letter of the 29th of July was no recognition on the part of the bankrupts of

[i] 5 East 186, 7. [j] *Id.*

of the act of the defendants in stopping the goods, nor an agreement to rescind the contract. On the contrary, it imported that they did not choose to do any thing without the approbation of the creditors at large[k].

So, a bankrupt may, though after his bankruptcy, give the goods up to the consignor, at any time before he has taken actual possession, if there be no fraud. In the case of Mills and Ball, doubts having arisen with some of the court, respecting the effect of a letter written by the bankrupt, eight days after the act of bankruptcy, but whilst the goods remained in the hands of the wharfinger (who had paid the freight, &c.), informing the vendor of the embarrassed state of his concerns, and relinquishing the goods, which had been received by the wharfinger on his account; Heath, J. declared himself of opinion, that the letter would not prejudice the plaintiff's right[l]. He said, that the refusal by the bankrupt to receive the property had, in another case[m], been considered meritorious; and the learned judge thought, that in this case, the conduct of the bankrupt was commendable. Rooke, J. said, it was agreed, that a contract once completely executed, cannot be rescinded. If, therefore, the goods had got into the hands of the consignee, there is no doubt but that he would have been precluded from giving a preference to any one. The plaintiff's claim was made in consequence of information (which appeared to him very proper) that circumstances had arisen in the affairs of the consignee, which made it dishonest in him to receive the goods,

Or, even after the act of bankruptcy, if there be no fraud.

[k] 5 East 186, 7. [l] 2 B. & P. 462. [m] Atkin *v.* Barwick, *ante*, 515.

goods, and in what manner that information was obtained, could not alter the case. The honesty of the consignee ought not to prejudice the plaintiff's right. If indeed the consignee, after getting the goods into his hands, had given them up, the case would have been very different. But there, the information was given while the goods were *in transitu*, and while they remained *in transitu* they might be stopped[m]. Chambre, J. observed, that the vendor did not get possession of the goods by his own diligence and care, or in consequence of casual information, but through the intervention of the bankrupt himself, eight days after the act of bankruptcy committed, which circumstance raised some doubt in his mind; since it appeared that the bankrupt had thereby given a preference to the plaintiff over all his other creditors. But still, upon the whole, he was inclined to agree with the rest of the court; rather than multiply small distinctions, of which too many had been already taken. The general inconvenience (he said) would not be very great, since many cases of that kind were not likely to arise. It seems, indeed, that there would be a certain degree of discretion vested in the bankrupt, since he would be empowered to accept goods which are coming to him from one consignee, and to give notice to another consignee to stop them *in transitu*. But as no fraud appeared to have been committed on the part of the plaintiff in that case, he was inclined, on this point, as well as the others, though not without some doubt, to concur with the other judges[n].

It

[m] 2 B. & P. 463. [n] *Id.* 464.

Delivery for the purpose of giving an undue preference, &c. transfers no property.

It would be quite foreign to a work of this sort, to consider particularly, what delivery of goods by a debtor to his creditor is ineffectual, on the ground of an undue preference. That is fully discussed in books on the bankrupt laws. But it may here with propriety be observed, that if a trader, in contemplation of an act of bankruptcy, and with a declared intention of giving an undue preference to a particular creditor (however meritorious), order his servant to deliver goods or securities, of more than the amount of the debt, to such creditor, in discharge of his debt, pursuant to no previous contract, obligation or course of dealing, without the privity of the creditor or any call on his part, and without a possibility of the goods, &c. being delivered to him, before the intended act of bankruptcy is committed; such delivery to the servant cannot transfer any right of property to the creditor. It is, in effect, an order how the estate shall be apportioned after the bankruptcy. And such delivery may be countermanded. The act not being complete, the bankruptcy is of itself a revocation of it[o]. If the goods be lost, or the parties to the securities become insolvent, the creditor is not bound to accept them in satisfaction of his debt. It is sufficient to invalidate the delivery, that it is declared to be meant to give an undue preference, which the law will not allow. If it were in pursuance of a prior agreement, the case might be different[p].

In

[o] *Sed vide ante*, 433. [p] See the case of Harman and Fisher, Cowp. 117, 124, 5.

So, if the vendor do not assent, till after an act of bankruptcy.

In general, before an act of bankruptcy, it is perfectly competent to the vendor and vendee to rescind the contract; and it seems that the contract is rescinded by relation from the time of writing and sending a letter by the vendee to the vendor, clearly indicating the intention of the former not to take the goods; though it do not reach the vendor till two days afterwards, and it is not till the following day that he writes any answer, and then he does not expressly assent to take back the goods; if the letter impliedly intimates such assent, and he subsequently comes up to town for the purpose of demanding them of the person in whose custody they are[p]. But if any act of bankruptcy intervene, between the offer to rescind the contract and the assent to such offer, the assent comes too late, to prevent the operation of the act of bankruptcy[q].

The goods must be returned, if at all, before acceptance. They cannot afterwards.

If where goods remain in bulk, and discernable from the general mass of the trader's property at the time of a bankruptcy, they could be returned to the original owners, who have received no compensation for them, without injury to the claim of others, it would be very reasonable and just; but that cannot be done without breaking in upon the whole system of the bankrupt laws. Cases of this sort are tried upon the evidence of the bankrupt and his servants; who wish to favour a particular creditor. The true rule is, that if the goods are not delivered to and accepted by the bankrupt, the property remains in the consignors; but after they

[p] Richardson *v.* Goss, 3 B. & P. 119, *ante*, 555, 6. [q] *Id.* 125, *per* Heath, J. *ante*, 557.

they are once delivered and accepted, the bankrupt has no power to rescind the contract and return them[r]. That is the principle which governs in such cases. The question is, did the bankrupt accept the goods?

This question must, in some cases, depend upon the contract between the parties. If goods are by the contract returnable in a limited time, or on certain conditions, unless they are returned within that time, or if those conditions are not complied with, they cannot afterwards be returned. For the keeping of them beyond the appointed time, and the neglect to perform the conditions of the contract, amount to an acceptance of the goods by the consignee; unless indeed the one be caused by the unjustifiable refusal of the consignor to take back the goods, or the other be occasioned by his hindering the consignee from performing the condition. Other circumstances may equally amount to an acceptance of the goods, or furnish evidence from which a jury may infer the fact; as, opening, or unpacking them, weighing them off, or the like. In general, the consignee must decide immediately whether he will accept or return them, and act accordingly[s].

What amounts to an acceptance of them, in general.

It is a material circumstance, if there be a frequent and convenient mode of returning the goods by the consignee to the consignors; for if there be, and they are not returned in a reasonable time, that amounts to an acceptance of them, notwithstanding they are not entered

If the trader delay the return fourteen days, till he is insolvent and on the eve of bankruptcy; that is an acceptance.

[r] *Per* Lord Kenyon, 2 East 123, 4. [s] *Id.* 125.

entered by the consignee as part of his stock[t]. In the case cited, the consignee lived at Devizes, and the consignors at Bristol, between which places there is daily, and almost hourly intercourse. On the 19th of February, the goods came into the custody of the bankrupt, by virtue of previous orders for them. By the custom of the trade, he had a right to return the goods if he had no call for them, though previously ordered. He, doubting his own situation, but meaning, in case of his insolvency, to return the goods to the consignors, wished to dispose of them according to the event; and kept them till the 4th of March, when he delivered some of the goods to a carrier to take back to the defendants, and wrote a letter to them, saying he could not take them to account. On the 5th, he delivered the rest to the carrier; and wrote another letter, inclosing the invoice, to the defendants, saying, that in consequence of losses in trade it was doubtful if he could pursue it, and had not taken the goods into his stock, and hoped they would have no objection to receive them back; and requesting an answer. On the 5th of March, he was denied to a creditor; and on the 6th, he left his house. On the 7th, the defendants wrote him a letter, in approbation of his conduct. The bankrupt deposed, that at the time of returning the goods he had not bankruptcy in contemplation, though he was sensible of his insolvency, and he did not therefore take them into his stock. But it was held, that although his intentions were good, he was bound to decide immediately whether he would accept or return the goods; and his not returning them,

[t] Neate v. Ball, 2 East 117.

them, or giving notice of his intention so to do, for fourteen days, amounted to an acceptance[u].

For if he had continued solvent, and the defendants had refused to take the goods back, it might have been a disputable point, whether he could keep them for so long a period, to take advantage of the rise and fall of the market. Indeed he certainly could not: it might as well have been contended, that he had an option to return the goods after an act of bankruptcy[v]. Nor was the agreement to take them back till after the bankruptcy, when the bankrupt was incompetent to make any bargain concerning them. Till the re-delivery, the goods must be considered as continuing in his hands; because they were in the custody of the carrier, who was his agent[w]. The evidence proved an acceptance of the goods by the bankrupt, which was found by the verdict; and he, being insolvent when they were returned, was not then in a capacity to rescind the contract[x]. The letter of the 5th of March was inconsistent with the defence, that the bankrupt had a right to return the goods at that time[y]; that letter being an admission of a previous acceptance of the goods. And their not being entered in the bankrupt's stock was not material. A contrary doctrine would introduce great fraud on the bankrupt laws[z].

His subsequent agreement to return the goods, or not entering them in his stock, is immaterial.

[u] Neate *v.* Ball, 2 East 117. [v] *Sed vide ante*, 561. [w] *Per* Lord Kenyon, C. J. 2 East 125, 6, *et vide ante*, 518. But see 3 B. & P. 119, *per* Heath, J. [x] 2 East 126. [y] *Id.* 126, 7. [z] *Id.* 127.

2 Jul. 11

APPENDIX.

APPENDIX.

London, the ——— day of ———, 1812.

Memorandum of charter. It is, this day, mutually agreed, between A. B. master (or, owner) of the good ship or vessel called the ———, of the burthen of ——— tons, or thereabouts, now lying in the port of London; and C. D. of ———, merchant; that the said vessel, being made by the said master tight, staunch, strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to ———, or so near thereto as she can safely get, for the purpose of loading from the factors of the said merchant a full and complete cargo of —————, which the said merchant binds himself to furnish, and bring alongside the said vessel there; and the said master shall there load and stow on board the said vessel such goods, or so much thereof as she shall be able reasonably to carry over and above her tackle, apparel, provisions and furniture; and the said vessel being so loaded with the said goods, the said master shall, with all convenient speed, proceed therewith to the port of ———, or so near thereunto as she can safely get, and there make right and true delivery of the same to the correspondents, agents or assigns of the said merchant (the acts of God or the king's enemies; detentions and restraints of kings, princes, rulers and republics; fire, the dangers and accidents of the seas, rivers and navigation; and all and every other unavoidable dangers and accidents, always excepted); on being paid for freight the sum of £———. The freight to be paid on unloading, and right delivery of the cargo. The said merchant to be allowed ——— lay or running days (if the ship be not

Memorandum for charter. *Ante*, 4.

Agreement for sea-worthiness of ship.

Furnishing and loading cargo.

Carriage and delivery thereof.

Exception.

Freight and demurrage.

not sooner dispatched) for loading the said cargo at ———, and for unloading the same at ———; and to detain the said ship ——— days on demurrage, over and above her lay days, at the rate of £——— *per* day. The penalty for non-performance of this agreement on either side, to be £———.

Penalty.

A. B.
C. D.

Charter-party of affreightment.
Ante, 2, &c.

This charter-party of affreightment, indented and made the ——— day of ———, in the year of our Lord one thousand eight hundred and thirteen. Between A. B. owner (or master) of the ship or vessel called the ———, of the burthen of ——— tons, or thereabouts, now lying in the port of London, of the one part; and C. D. of London, merchant, freighter of the said ship or vessel, of the other part; *witnesseth*, that the said owner (or master) for the considerations hereinafter mentioned, hath granted and to freight letten, and by these presents doth grant and to freight let, unto the said merchant (who hath accordingly hired and taken to freight, and by these presents doth hire and take to freight) the said ship or vessel, for the voyages, and upon the terms and conditions following: (that is to say), The owner of the said ship or vessel (or, the said master), shall and will forthwith render the said ship or vessel tight, staunch, strong, properly rigged, sufficiently manned, and in every respect fit for navigation, and to perform the outward and homeward voyages hereinafter mentioned; and shall thereupon with all convenient speed, receive on board, load and stow, in a regular and proper manner, all such goods and merchandizes as shall or may be sent by the said freighter, alongside the said ship or vessel, in the said port of London, not exceeding what the said ship or vessel can conveniently and safely carry over sea, besides her provisions, tackle, apparel and appurtenances (the master's cabin, and the usual and necessary room for the ship's crew excepted); and being so laden, and being also dispatched, the said master shall and will, with the then first favourable wind and opportunity, set sail and depart, without delay, in the said ship or vessel, from the said port of London, and proceed, with the next convoy, to the port of ———, and upon his arrival there, address himself to the agents

Fitting the ship for her outward voyage.
Ante, 21, &c.

Loading the goods.
Ante, 35, &c.

Sailing of the ship.
Ante, 40, &c.

agents or correspondents of the said freighter; and, as soon after as may be, make discharge, and right and true delivery of the said goods and merchandizes, unto the agents, correspondents or assigns of the said freighter, according to the bills of lading; and so end the said outward voyage. And after delivery of the said outward cargo as aforesaid, the said master shall and will, forthwith, render the said ship or vessel in all respects fit to receive her homeward cargo, and perform her homeward voyage. And the said master shall and will thereupon, with all convenient speed, receive on board, load and stow, in a regular and proper manner, all such goods and merchandizes as shall or may be sent alongside the said ship or vessel at the said port of ———, by the said freighter, his correspondents or agents, not exceeding what the said vessel can conveniently and safely carry over sea (besides and except as hereinbefore mentioned and excepted); and being so laden, and being also again dispatched, the said master shall and will, with the then first favourable wind and opportunity, without delay, set sail and depart from the said last-mentioned port in the said ship or vessel, and proceed therewith direct to the said port of London; and upon arrival in the London docks, make discharge, and right and true delivery of the said homeward cargo, unto the said freighter or his order, according to the bills of lading; and so end the said homeward voyage (the acts of God and the king's enemies; the dangers and accidents of the seas, rivers and navigation; the restraints and detentions of kings, princes, rulers and republics, and all and every other unavoidable dangers and accidents, excepted). And the said owner (or, master) for himself, his executors and administrators, doth hereby covenant, promise and agree, to and with the said freighter, his executors and administrators, that the said master shall not nor will, in either the said outward or homeward voyage, take or load on board, or suffer to be taken or loaden on board the said ship or vessel, any goods, merchandizes, packets, letters or parcels whatever, from any other person or persons whomsoever other than the said freighter, without his consent and permission, or the consent and permission of his agents, correspondents or assigns, in writing for that purpose first had and obtained. And the said freighter, for himself, his executors and administrators, doth

Delivery of the outward cargo. *Ante*, 69, &c.

Refitting for the homeward voyage.

Loading of homeward cargo.

Sailing on homeward voyage.

Delivery of the homeward cargo.

Exceptions. *Ante*, 93, &c.

Master's covenant not to take any goods, &c. but freighter's. *Ante*, 37, 8.

Freighter's covenant to procure cargoes, &c. *Ante*, 110, &c. 117, &c.

doth hereby covenant, promise and agree, to and with the said master, his executors and administrators, that he the said freighter shall and will procure, and cause to be sent alongside the said ship or vessel, to be loaded on board thereof, such outward and homeward cargoes as aforesaid, and procure the necessary licences for the same. And also that he shall and will well and truly pay, or cause to be paid unto the said owner (or, master), his executors or administrators, the sum of £——, in full for the freight of the said outward cargo, upon the right and true delivery thereof; and the sum of £——, in full for the freight of the said homeward cargo, upon the right and true delivery thereof, as aforesaid. And which said sums of money shall be in entire satisfaction and in lieu of all primage and average, pilotage and port-charges whatever, for the said outward and homeward voyages. And it is hereby covenanted and agreed by and between the said parties, that the said merchant shall be allowed ——— lay or running days in the whole, for loading and unloading the said outward and homeward cargoes, to commence and be computed from and exclusive of the days after the said master shall be ready to take in and discharge his said respective cargoes, and notice given thereof to the freighter, his agents, correspondents or assigns. And it is further agreed by and between the said parties, that it shall be lawful for the said freighter, or his agents, correspondents or assigns, to keep and detain the said ship or vessel on demurrage, for the space of ——— working days, over and above the before-mentioned running or lay days, upon paying the said master, his executors or administrators, at the rate of £—— sterling *per* day, for each and every of the said —— days of demurrage. And it is hereby further mutually covenanted and agreed by and between the said parties, that the said freighter shall be at liberty to place and send on board the said vessel a supercargo during the said voyages, for whose passage the said master shall make no charge whatever (the said supercargo, however, finding and providing himself in all necessaries during the said voyages.) And for the due performance of all and singular the covenants, conditions and agreements, herein contained, the said parties mutually bind themselves, their executors and

To pay freight. *Ante*, 142, &c.

Primage and average, &c. *Ante*, 188, &c.

Demurrage. *Ante*, 129, &c.

Liberty to send on board a supercargo. *Ante*, 189.

Penal clause. *Ante*, 195, &c.

and administrators, in the penal sum of £——, firmly by these presents. In witness whereof, the said parties have hereunto set their hands and seals, in London, the day first above written.

Signed, sealed and delivered, being first duly stamped, in the presence of E. F. } A. B. (*l. s.*) C. D. (*l. s.*)

The following references to other forms of charter-parties may be useful: Other forms of charter-parties. *Ante*, 6.

Of part of a vessel by the master and owners to the merchant. —*Beawes's Lex Mercatoria.*

By the owners of one moiety, to the owners of the other moiety.—*Id.*

By the East India Company.—*Doug.* 273. 10 *East* 468. 13 *East* 291.

By the commissioners of the transport office.—3 *East* 233.

By the commissioners of the navy.—2 N. R. 182.

Other forms of charter-parties, and pleadings upon them, will be found in the printed reports of the cases which are quoted in the previous part of this volume.

A. B. Shipped, in good order and well conditioned, by A. B. merchant, in and upon the good ship called ———, whereof C. D. is master, now in the river Thames, and bound for ———, the goods following, viz.—[here describe the goods]—marked and numbered as *per* margin, to be delivered, in the like good order and condition, at ——— aforesaid, (the acts of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever, excepted), unto the said A. B. or his assigns, he or they paying freight for the said goods at the rate of ——— *per* ———, with primage and average accustomed. In witness whereof I the said master of the said ship, have affirmed to three bills of lading of this

Bill of lading. *Ante*, 316, &c.

Exception. *Ante*, 317, &c.

Rate of freight, &c. *Ante*, 572, 3.

this tenor and date; any one of which bills being accomplished, the other two are to be void.

Dated at London, this ——— day of ———, 1813.

C. D.

Note. In the case of ships homeward bound from the West India islands, which send their boats to fetch the cargoes from the shore, the following saving clause is added to the exception in the bills of lading: " save risk of boats, so far as ships are liable thereto."—*Abbot* 226.

Declaration in debt on a charter-party under seal, against the merchant, for freight and demurrage. *Ante*, 228, 9.

Statement of the charter-party. *Ante*, 229.

For that whereas, heretofore, to wit, on, &c. at, &c. by a certain charter-party of affreightment then and there made, between the said A. B. as owner of a certain ship or vessel, therein mentioned to be then lying in the port of London, of the one part; and the said C. D. as freighter of the said ship or vessel, of the other part, (one part of which said charter-party, sealed with the seal of the said C. D. the said A. B. now brings here into court, the date whereof is the day and year aforesaid), it was witnessed, &c. (here recite the charter-party to the end of the covenant, for payment of demurrage; then proceed as follows) as by the said charter-party (reference being thereunto had) will (amongst other things) fully appear. And the said A. B. avers, that the said master of the said ship or vessel did, forthwith after the making of the said charter-party, render the said ship or vessel tight, &c. and in every respect fit, &c. (in the words of the charter-party) and did thereupon, with all convenient speed, receive on board, load and stow, in a regular and proper manner, divers goods and merchandizes, sent by the said freighter alongside the said ship or vessel, in the said port of London, according to the said charter-party. And the said ship or vessel being so laden, and being also dispatched, the said master did, afterwards, to wit, on, &c. set sail and depart in the said ship or vessel, from the said port of London, and proceed, with the next convoy, to the port of ——— aforesaid. And

Special averments of performance. *Ante*, 230.

Fitting the ship, and loading the outward cargo. *Ante*, 21, &c. 25, &c.

Sailing on outward voyage. *Ante*, 40, &c.

And afterwards, to wit, on, &c. upon his arrival there, did address himself to the agents of the said freighter, and make discharge, and right and true delivery of the said goods and merchandizes unto such agents, according to the bills of lading, and so ended the said outward voyage, according to the form and effect of the said charter-party in that behalf. And the said A. B. further saith, that after final delivery of the said outward cargo as aforesaid, the said master did forthwith render the said ship or vessel in all respects fit to receive her homeward cargo, and perform her homeward voyage; and thereupon, with all convenient speed, did receive on board, load and stow, in a regular and proper manner, divers other goods and merchandizes, sent alongside the said ship or vessel by the said agents, in the said port of ———, according to the said charter-party. And being so laden, and being also again dispatched, the said master did afterwards, to wit, on, &c. set sail and depart from the said last-mentioned port in the said ship or vessel, and proceed therewith to the said port of London; and afterwards, to wit, on, &c. upon arrival in the London docks, make discharge, and right and true delivery of the said homeward cargo, according to the bills of lading; and so ended the said homeward voyage, according to the form and effect of the said charter-party in that behalf. And although the said A. B. well and truly performed and fulfilled all things in the said charter-party contained, on his part, to wit, at, &c. aforesaid: yet protesting that the said C. D. hath not performed or fulfilled any thing therein contained on his part, the said A. B. in fact saith, that upon the right and true delivery of the said outward and homeward cargoes respectively as aforesaid, there became and was due and payable from the said C. D. to the said A. B. for the freight thereof under the said charter-party the said sums of £——— and £——— in the said charter party mentioned. Whereby, and according to the form and effect thereof, an action hath accrued to the said A. B. to demand and have of and from the said C. D. the said several sums of £——— and £———, parcels of the said sum of £——— above demanded. And the said A. B. further saith, that the said C. D., by his said agents, did keep and detain the said ship or vessel on demurrage, divers, to wit,

Arrival; and delivery of the cargo. *Ante*, 69, &c. 232.

Refitting the ship.

Loading the homeward cargo.

Sailing on homeward voyage.

Arrival; and delivery of the cargo.

General averments of performance, &c. *Ante*, 230, &c.

Freight due. *Ante*, 284.

Per quod actio accrevit. *Ante*, 235.

Demurrage. *Ante*, 130, &c.

wit, —— working days, over and above the said running days allowed by the said charter-party for loading and unloading the said respective cargoes as aforesaid; whereby, and according to the form and effect of the said charter-party in that behalf, the said C. D. became liable to pay to the said A. B. a large sum of money, to wit, the sum of £———, being at the rate of £——— sterling *per* day, for each and every of the said days of demurrage, during which the said ship or vessel was so kept and detained as aforesaid; and thereby, and according to the form and effect of the said charter-party in that behalf, an action hath accrued to the said A. B. to demand and have of and from the said C. D. the said sum of £———, residue of the said sum of £——— above demanded. Yet the said C. D. (although often requested, &c.) hath not paid the said sum of £——— above demanded, or any part thereof, to the said A. B., but hath hitherto wholly refused, and still refuses so to do. To the damage of the said A. B. of £———, and therefore he brings his suit, &c.

Per quod, &c.

Breach. *Ante*, 234.

Similar declaration in covenant. *Ante*, 228.

The form of declaring in covenant is precisely similar to the above, except in the assignment of breaches and the conclusion, which in that action are in the following form, after the protest of the defendant's general performance: "The said A. B. in fact saith, that the said C. D. did not, nor would, upon the right and true delivery of the said outward and homeward cargoes respectively as aforesaid, pay or cause to be paid to the said A. B. for the freight thereof, the said sums of £—— and £—— or either of them, or any part thereof, but hath hitherto wholly refused, and still refuses so to do; contrary to the form and effect of the said charter-party, and of the said covenant of the said C. D. by him in that behalf made as aforesaid. Omit the *per quod actio accrevit:* and in assigning the breach for demurrage, instead of the *per quod actio accrevit*, say, " but which said last-mentioned sum of money is still in arrear and unpaid to the said A. B. contrary to the form, &c." The conclusion is as follows: " And so the said A. B. in fact saith, that the said C. D. hath not kept, but hath broken, the said covenant so by him made with the said A. B. in manner and form aforesaid;

and

and to keep the same with the said A. B. hath hitherto wholly refused, and still doth refuse. To the damage, &c."

As in the declaration for freight (*ante*, 574,) to the end of the averment of fitting the ship; then proceed as follows:—And although the said master was ready and willing to receive on board, load and stow, in a regular and proper manner, all such goods and merchandizes as might have been sent by the said C. D. alongside the said ship or vessel in the said port of London, not exceeding, &c. the master's cabin, &c. (in the words of the charter-party.) And although, &c. yet protesting, &c. (general performance, and non-performance, (*ante*, 575,) the said A. B. in fact saith, that the said C. D. did not, nor would, procure or cause to be sent alongside the said ship or vessel, in the said port of London, such outward cargo as aforesaid, and procure the necessary licences for the same, or procure or send alongside the said ship or vessel any goods or merchandizes whatever to be loaded on board thereof for the said outward voyage, but wholly refused and neglected so to do, contrary to the form, &c. whereby the said master was forced and obliged to, and did proceed with the said ship or vessel in ballast on the said outward voyage; and the said A. B. lost and was deprived of all the freight, profit and reward, which might and would otherwise have arisen and accrued to him from such voyage, to wit, at, &c. aforesaid.

Form of declaring in covenant for dead freight, or damages for not procuring a cargo. *Ante*, 110, &c. 117, &c.

For that whereas, heretofore, to wit, on, &c. at, &c. by a certain charter-party of affreightment then and there made, between the said C. D. as owner of a certain ship or vessel, therein mentioned to be then lying in the port of London, of the one part, and the said A. B. as freighter of the said ship or vessel of the other part; one part, &c. (*ante*, 574,) it was witnessed, &c. (here recite the charter-party to the end of the clauses respecting the freight, primage and average, &c. as by the said charter-party, &c. (*ante*, 574.) And the said A. B. avers, that after the making of the said charter-party, to wit, on, &c. at, &c. he the said A. B. did procure, and cause to be sent alongside the said ship or vessel, in the port of London

Declaration in covenant, against the ship-owner, for not receiving the goods on board. *Ante*, 55, &c.

Averment that plaintiff procured a full cargo. *Ante*, 110, &c. 117, &c.

aforesaid, a full and complete cargo of ——— to be loaded on board the said ship or vessel, for the said outward voyage in the said charter-party mentioned; and procured the necessary licences for that purpose. And although the said A. B. then and there requested the said master to receive on board, load and stow, the said goods and merchandize in and on board of the said ship or vessel, (the same not exceeding what the said ship or vessel could conveniently and safely carry over sea, besides her provisions, tackle, apparel and appurtenances, exclusive of the master's cabin, and the usual and necessary room for the ship's crew.) And although, &c. yet protesting, &c. (general performance and non-performance, *ante*, 575,) the said A. B. in fact saith, that the said C. D. did not nor would, when he was so requested as aforesaid, or at any time afterwards, receive on board, load and stow, on board the said ship or vessel, the said goods and merchandize, so sent alongside the same as aforesaid, or any part thereof, but wholly refused and neglected so to do; and afterwards, to wit, on, &c. last aforesaid, set sail and departed in the said ship or vessel, from the said port of London, without such goods, contrary, &c.

And requested the master to receive goods, not exceeding the ship's burthen. *Ante*, 35, 37.

That the master refused to receive the goods. *Ante*, 202.

And sailed without them. *Ante*, 34.

For not sailing in time, whereby the market was lost. *Ante*, 202.

As in the last precedent, (omitting the request to load) to the end of the general averments of performance, &c. then proceed as follows:—The said A. B. in fact saith, that although the said master of the said ship or vessel received, loaded and stowed, the said goods and merchandizes on board the said ship or vessel, and was also duly dispatched, yet the said master did not nor would, with the first favourable wind and opportunity, after the said ship or vessel was so laden with her cargo, and dispatched as aforesaid, and without delay, set sail or depart with the same from the said port of ———, on her said outward voyage; but wholly refused, delayed, and neglected so to do, for a long space of time, to wit, for the space of ——— then next following, contrary to the form, &c. whereby the said A. B. lost and was deprived of the opportunity of selling and disposing of the said outward cargo at the then approaching market (or, season) at ——— aforesaid, and divers great gains and profits which might and would otherwise have

have arisen and accrued to him from so doing; to wit, at, &c. aforesaid.

As in the last precedent, to the allegation of the master's neglect to sail, instead of which proceed as follows:—And although the said master of the said ship or vessel set sail and departed therein with the said outward cargo, from the said port of London, and could and might, and ought to have proceeded to the port of ——— aforesaid with convoy; yet the said master wholly neglected and omitted so to do; and on the contrary thereof proceeded with the said ship or vessel and cargo towards and for the port of ——— aforesaid, without the company or protection of the usual and proper convoy, or any convoy whatsoever, contrary to the form, &c. whereby the said ship or vessel, and the said cargo on board thereof, were afterwards, to wit, on, &c. on the high seas, captured as prize by certain enemies of our said lord the king, and the said cargo became and was wholly lost to the said A. B. who was thereby also deprived of divers great gains, &c. (as in the last precedent.)

For sailing without convoy; whereby the cargo was captured. *Ante*, 202.

After stating the charter-party with a *prout patet*, and the usual averments of performance, &c. as in the precedent, (*ante* 574, 5,) proceed as follows:—The said A. B. in fact saith, that although the said C. D. loaded and delivered the outward cargo of the said ship or vessel, and received on board thereof a full and complete cargo of ——— from the agents of said A. B. at the said port of ———, to be carried and conveyed to the port of London aforesaid, and afterwards proceeded on the said homeward voyage therewith, and arrived in the London docks; yet the said master did not nor would, after delivery of the said outward cargo as aforesaid, render the said ship or vessel fit to receive the said homeward cargo, or to perform the said last-mentioned voyage as aforesaid; but on the contrary thereof the said ship or vessel was then leaky, greatly out of repair, and wholly unfit to perform the said last-mentioned voyage, and so remained and continued during such voyage; nor did nor would the said master load and stow the said last-mentioned cargo in a regular and

For not making a right and true delivery of the homeward cargo. *Ante*, 69, &c. 202.

That the master neglected to refit the ship for her homeward voyage. *Ante*, 24.

And did not stow the goods properly. *Ante*, 202.

and proper manner on board of the said ship or vessel, but wholly refused and neglected so to do. Nor did nor would the said master, upon the arrival of the said ship or vessel in the London docks, make discharge, and right and true delivery of the said homeward cargo, or any part thereof, unto the said freighter, or his order, according to the bills of lading, or otherwise, (although neither the acts of God or the king's enemies, nor any of the dangers and accidents excepted in the said charter-party, prevented him from so doing;) but, on the contrary thereof, great part of the said homeward cargo, by means of the carelessness, negligence and default of the said master, during the said last-mentioned voyage, became and was wholly lost to the said A. B. and the residue of the said last-mentioned cargo, by means of the leaky and decayed state of the said ship or vessel, and the bad stowage of the said last-mentioned cargo on board thereof as aforesaid, became and was greatly wetted, damaged and spoiled, and of little or no use or value to the said A. B. contrary to the form and effect of the said charter-party, and of the said covenant so made by the said C. D. in that behalf as aforesaid, to wit, at, &c. aforesaid.

Or make right and true delivery of them. *Ante*, 202.

That he was not prevented from so doing by the acts of God, &c. *Ante*, 98, &c.

That part of the goods was lost by his neglect, and the rest damaged by the leaky state of the ship, and bad stowage. *Ante*, 35, &c. 202.

Special count in assumpsit, against the merchant, for not chartering the ship, according to contract.

For that whereas, heretofore, to wit, on, &c., at, &c. in consideration that the said A. B. then and there being owner of a certain ship or vessel of the burthen of —— tons, or thereabouts, at the special instance and request of the said C. D. had then and there agreed with, and undertaken and faithfully promised him the said C. D. to let to hire the said ship or vessel to him, to go and proceed from the port of London to ——, and back again, for certain freight or reward, at the rate of £—— *per* ton, for the voyage out, and £—— *per* ton for the voyage home; he the said C. D. undertook, and then and there faithfully promised the said A. B. to hire and take, of him, the said ship or vessel, for the said voyages, at such freight as aforesaid. And the said A. B. avers, that he, confiding in the said promise and undertaking of the said C. D. was always ready and willing to let to hire the said ship or vessel to him the said C. D. for the said voyages, for such freight as aforesaid,

The promise.

The plaintiff's offer to let the ship to freight.

aforesaid, and afterwards, to wit, on, &c. aforesaid, and often since, at, &c. aforesaid, offered so to do, and requested the said C. D. to hire and take the said ship or vessel to freight as aforesaid accordingly. Yet the said C. D. not regarding his promise and undertaking aforesaid, but contriving and intending to deceive and defraud the said A. B. in this behalf, did not nor would, when he was so requested as aforesaid, or at any time before or afterwards, hire or take of him the said ship or vessel for the said voyages as aforesaid, at such freight as aforesaid, but then and there wholly and absolutely refused so to do. Whereby, and in expectation of the said C. D.'s performing his promise and undertaking aforesaid, the said ship or vessel was kept and detained in the port of London aforesaid, for a long space of time, to wit, for the space of ——; and the said A. B. during that time lost the use of the said ship or vessel, and hath been deprived of all the profits, which might and would otherwise have arisen and accrued to him, from the said C. D.'s hiring and taking the same to freight as aforesaid, to wit, at, &c. aforesaid.

The defendant's refusal to take it.

The consequent detention of the vessel.

For that whereas, heretofore, to wit, on, &c. at, &c. it was agreed between the said A. B. as master of a certain ship or vessel, then lying in the port of London, and the said C. D. that the said vessel, being tight, &c. (here recite the memorandum for charter, *ante*, 569, to the end.) And the said agreement being so made, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said A. B. at the special instance and request of the said C. D. had then and there undertaken and faithfully promised the said C. D. to perform the same in all respects on the part of him the said A. B. he the said C. D. undertook and then and there faithfully promised the said A. B. to perform the said agreement in all respects on the part of him the said C. D.; and the said A. B. avers, that he, confiding in the said agreement, did, with all convenient speed, after making the said vessel tight, &c. sail and proceed to —— aforesaid, for the purpose of loading from the factors of the said C. D. a full and complete cargo of ——: whereof the said C. D. then and there had notice. And although the said A. B. was then and there ready and willing to load and stow on board the said vessel, such full and complete cargo of goods

On a memorandum for charter, against the freighter, for not furnishing a full cargo. *Ante*, 4, 117, &c.

Mutual promises to perform the

Plaintiff's willingness to perform his part of the contract.

goods as aforesaid, and proceed therewith to the port of ——— aforesaid, and there make right and true delivery thereof; and in all respects to perform the said agreement on his part; to wit, at, &c. aforesaid; yet the said C. D. not regarding his promise and undertaking aforesaid, but contriving and intending to deceive and defraud the said A. B. in this behalf, did not, nor would furnish or bring alongside the said vessel at ——— aforesaid, a full and complete cargo of such goods as aforesaid, or any other whatsoever, to be loaded on board the said vessel; but only furnished and brought alongside the same much less than a full cargo, contrary to the tenor and effect of the said agreement; whereby the said A. B. lost and was deprived of great part of the freight and reward, which might and would otherwise have been payable to him under the said agreement; to wit, at, &c. aforesaid.

The defendant's breach of it.

On a contract to pay freight in advance. *Ante*, 238, 9.

For that whereas, heretofore, to wit, on, &c. at, &c. in consideration that the said A. B. at the special instance and request of the said C. D. would receive and load on board of a certain ship or vessel of him the said A. B. then lying in the port of London, divers, to wit, —— tons (or bales) of ——— of the said C. D. to be carried and conveyed in and on board of the said ship or vessel a certain voyage, from the port of London aforesaid to parts beyond the seas, to wit, to ———, for freight or reward, at the rate of £——— *per* ton (or bale) for each and every ton (or bale) thereof; he the said C. D. undertook, and then and there faithfully promised the said A. B. to pay him at the rate aforesaid, in advance, for and on account of the carriage of the said goods, upon the loading thereof on board of the said ship or vessel at the port of London aforesaid. And the said A. B. avers, that he, confiding in the said promise and undertaking of the said C. D. did afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, receive and load on board the said ship or vessel the said goods, to be carried and conveyed as aforesaid; whereupon a large sum of money, to wit, the sum of £——— of lawful money of Great Britain, became and was payable from the said C. D. to the said A. B., in advance, for and on account of the carriage of the said goods, at the rate aforesaid; whereof the said C. D. then and there had notice. Yet the said C. D. not regarding

The promise.

The loading of the goods.

The sum due.

regarding his promise and undertaking aforesaid, but contriving and intending to deceive and defraud the said A. B. in this behalf, did not nor would, upon the loading of the said goods as aforesaid, or at any time afterwards, (although often requested, &c.) pay him the said sum of £———, or any part thereof, but hath hitherto wholly refused, and still refuses so to do.

Breach for non-payment in advance.

For that whereas the said C. D. heretofore, to wit, on, &c. at, &c. was indebted to the said A. B. in the sum of £- of lawful money of Great Britain; for the freight of divers goods and merchandizes, before that time carried and conveyed, in and on board of a certain other ship or vessel, whereof the said A. B. was master, (or, " owner") divers voyages, to and from parts beyond the seas, and delivered for the said C. D. at his special instance and request. And being so indebted, he the said C. D. in consideration thereof, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid undertook and then and there faithfully promised the said A. B. to pay him the said sum of money, when he the said C. D. should be thereto afterwards requested.

Count in *indebitatus assumpsit*, for freight. *Ante*, 238.

Note.—If there were any difference between the form of *indebitatus* counts for freight, &c. in assumpsit and debt, a greater particularity would be required in stating the debt in the latter of these actions; but since the cases of M'Quillin *v.* Cox, 1 H. B. 249, Emery *v.* Fell, 2 T. R. 28, and King *v.* Fraser, 6 East 351, it seems that the same general form of declaring which has prevailed in the action of assumpsit, may be adopted in debt. However, in debt, it is usual and proper to lay the sum under a videlicit; because the debt is traversable, which it is not in assumpsit. And instead of laying an express promise as in assumpsit, in debt the form of stating the contract is, by these words, " *to be paid* by " the said C. D. to the said A. B. when he the said C. D. should be thereto afterwards requested;" which is deemed a sufficient statement of the implied contract to pay the money. Com. Dig. tit. Pleader, 2 W. 11. It is not unusual to insert *quantum meruit* counts for freight, &c. in addition to the common *indebitatus* counts;

Difference between such counts in assumpsit and debt. *Quantum meruits*, useless.

counts; but the former are wholly useless where the latter are inserted, as any evidence may be given on an *indebitatus* count which can on a *quantum meruit;* though the converse will not hold.

Indebitatus count for demurrage. *Ante*, 236, 7.

And whereas the said C. D. afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, was indebted to the said A. B. in the further sum of £———, of like lawful money; for demurrage of the said ship or vessel, by the said C. D. at his like instance and request, and by the sufferance and permission of the said A. B. kept and detained on demurrage, in parts beyond the seas, for divers long spaces of time. And being so indebted, &c.

For the use and hire of the vessel. *Ante*, 237.

And whereas the said C. D. afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, was indebted to the said A. B. in the further sum of £———, of like lawful money; for the use and hire of the said last-mentioned ship or vessel, by the said C. D. at his like instance and request, and by the sufferance and permission of the said A. B. had and used, for divers other long spaces of time. And being so indebted, &c.

For money paid, &c. and breach.

Note.– Counts for money paid, and had and received, and on an account stated, are usually added to the above. The breach is in the common form applicable to such counts.

Count against the master or owner of the ship, in assumpsit, on the bill of lading, for losing the goods *Ante*, 373, &c. 389, &c.

For that whereas the said A. B. heretofore, to wit, on, &c. at, &c. at the special instance and request of the said C. D. caused to be shipped, in good order and well conditioned, in and upon a certain ship or vessel, whereof the said C. D. was master, (or, "owner") then in the river Thames, and bound on a voyage from thence to ———, divers goods and merchandizes, to wit, &c. (here set out the goods in the bill of lading) of him the said A. B. of a large value, to wit, of the value of £———, to be carried and conveyed by the said C. D. in and on board of the said ship or vessel, from the port of London aforesaid, to ——— aforesaid,

and

and there, to wit, at ——— aforesaid, to be delivered, in the like good order and condition (the acts of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, excepted;) unto the said A. B. and in consideration thereof, and also in consideration of certain freight and reward, to be therefore paid by the said A. B. to the said C. D. he the said C. D. then and there undertook and faithfully promised the said A. B. to carry, convey and deliver, the said goods and merchandizes as aforesaid, except as aforesaid. And although the said C. D., so being master (or "owner") of the said ship or vessel, then and there had and received the said goods and merchandizes, in and on board thereof, for the purpose aforesaid; yet the said C. D. not regarding his promise and undertaking aforesaid, but contriving and intending to deceive and defraud the said A. B. did not nor would (although he was not prevented from so doing by any of the perils, dangers or accidents, so excepted as aforesaid,) carry, convey and deliver, the said goods and merchandizes as aforesaid; but on the contrary thereof, so carelessly, negligently and improperly, behaved and conducted himself in this behalf, that by and through the carelessness, negligence, default and improper conduct of the said C. D. and his mariners and servants, the said goods and merchandizes became and were wholly lost to the said A. B. to wit, at, &c. aforesaid.

The contract.

Breach.

Note.—If there be any difficulty in proving the loss, or the complaint be only that the goods were not delivered in proper time, it is proper to add a second count, on a promise to deliver in a reasonable time, merely stating a non-delivery in such time. And if the goods be not lost, but damaged, the allegation is, that they were "greatly damaged and spoiled, and delivered to the said "A. B. in much worse order and condition than the same were in "at the time of the shipment thereof as aforesaid, and became "and were of little or no use or value to the said A. B. to wit, "at, &c. aforesaid."

For nor delivering the goods in proper time, or damaging them.

The only material difference between a declaration against the master or owner of a ship on the bill of lading, in case and in assumpsit,

The like form of declarations in *case*.

assumpsit, is, that instead of alledging an express *promise* to carry and deliver the goods, and that the defendant did not regard that promise, the allegation is, that in consideration of certain freight, &c. "it thereupon then and there became and "was the *duty* of the said C. D. to carry, &c." and afterwards, in assigning the breach, it is alleged, that the defendant "not re-"garding his duty," instead of "his promise and undertaking afore-"said" but contriving, &c.

Plea of *non est factum* to a declaration on a charter-party under seal. *Ante*, 239.

C. D. ats A. B. } And the said C. D. by ——, his attorney, comes and defends the wrong and injury, when, &c. and says, that the supposed charter-party of affreightment in the declaration above mentioned is not his deed, and of this he puts himself upon the country, &c.

When proper to plead it with oyer.

Note.—If the defendant wish to raise any question on the charter-party, not apparent from the recital of it in the declaration, he should crave oyer of it, and set it out in his plea; but otherwise that is unnecessary.

Nil debet, &c. *Ante*, 244.

The form of the general issues of *nil debet, non assumpsit* and *not guilty*, to declarations on charter-parties or bill of lading, being the same as in other actions of assumpsit, &c. and to be found in all books of entries or precedents, it would have been superfluous to insert them here.

Plea that the master did not make right and true delivery of the goods. *Ante*, 239.

C. D. ats A. B. } And the said C. D. by ——, his attorney, comes and defends the wrong and injury, when, &c. and says, that the said A. B. ought not to have or maintain his aforesaid action thereof against him; because he says, that the said master of the said ship or vessel did not make discharge, and right and true delivery of the said goods and merchandizes in the said declaration mentioned, or any part thereof, in manner and form as the said A. B. hath above in his said declaration alleged. And of this he the said C. D. puts himself upon the country, &c.

Actionem

Actionem non.—Because he says, that the said C. D. did not keep or detain the said ship or vessel, on demurrage, in manner and form as the said A. B. hath above in his declaration alleg And of this he puts himself upon the country, &c.

Plea that the merchant did not detain the ship on demurrage. *Ante,* 239.

Actionem non.—Because he says, that he the said C. D. did well and truly pay unto the said master of the said ship or vessel the said sum of £———, in full, for the freight of the said outward cargo, upon the delivery thereof, and the said sum of £———, in full, for the freight of the said homeward cargo, upon the delivery thereof, according to the form and effect of the said charter-party, and the said covenant of the said C. D. so by him made in that behalf as aforesaid, to wit, at, &c. aforesaid. And of this, &c.

Plea of payment of freight and demurrage. *Ante,* 239, 40.

Actionem non.—Because he says, that after the said ship or vessel had sailed and departed from the said port of ———, and whilst she was proceeding on her said homeward voyage, on the high seas, to wit, on, &c. the said ship or vessel, and the said goods and merchandizes on board thereof, were, by and through the force and violence of storms and tempests, and without any fault or neglect in the said master of the said ship or vessel, unavoidably wrecked, and wholly lost. And this he the said C. D. is ready to verify, wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action thereof against him, &c.

Plea, that the ship and goods were lost by storms. *Ante,* 240.

A. B. against C. D. } And the said A. B. says, that he, by reason of any thing by the said C. D. in his plea above alleged, ought not to be barred from having or maintaining his aforesaid action thereof against him; because he says, that the said goods and merchandizes were lost by the fault and neglect of the master of the said ship or vessel; and not by or through the force and violence of storms or tempests, in manner and form as the said C. D. hath in his said plea alleged. And this he the said A. B. prays may be enquired of by the country, and the said C. D. doth so likewise. Therefore, &c.

Replication, that the goods were lost by the fault of the master; and issue thereon. *Ante,* 96, 7

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THE END.

Printed by S. Brooke, Paternoster-row,
London.